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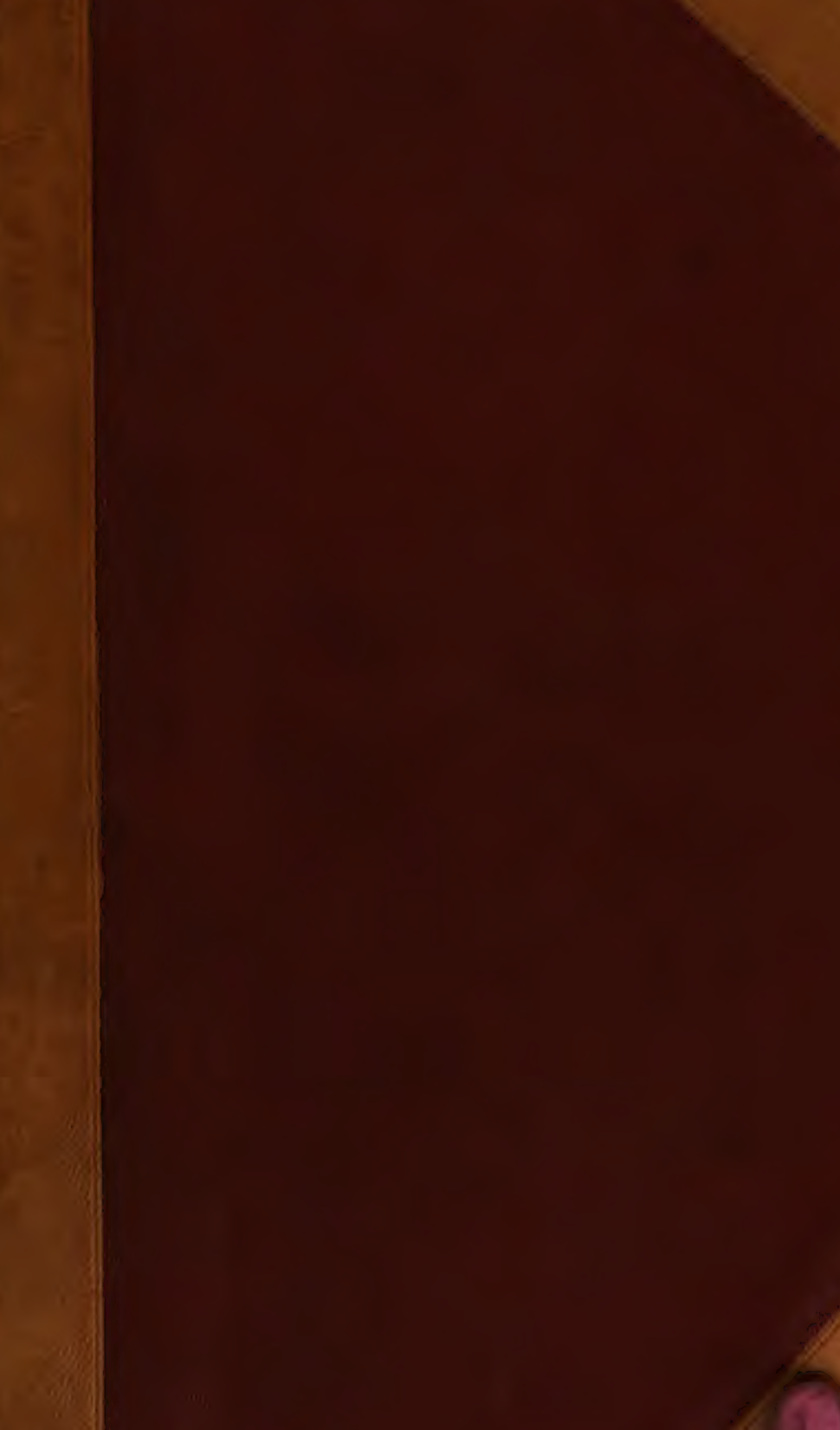
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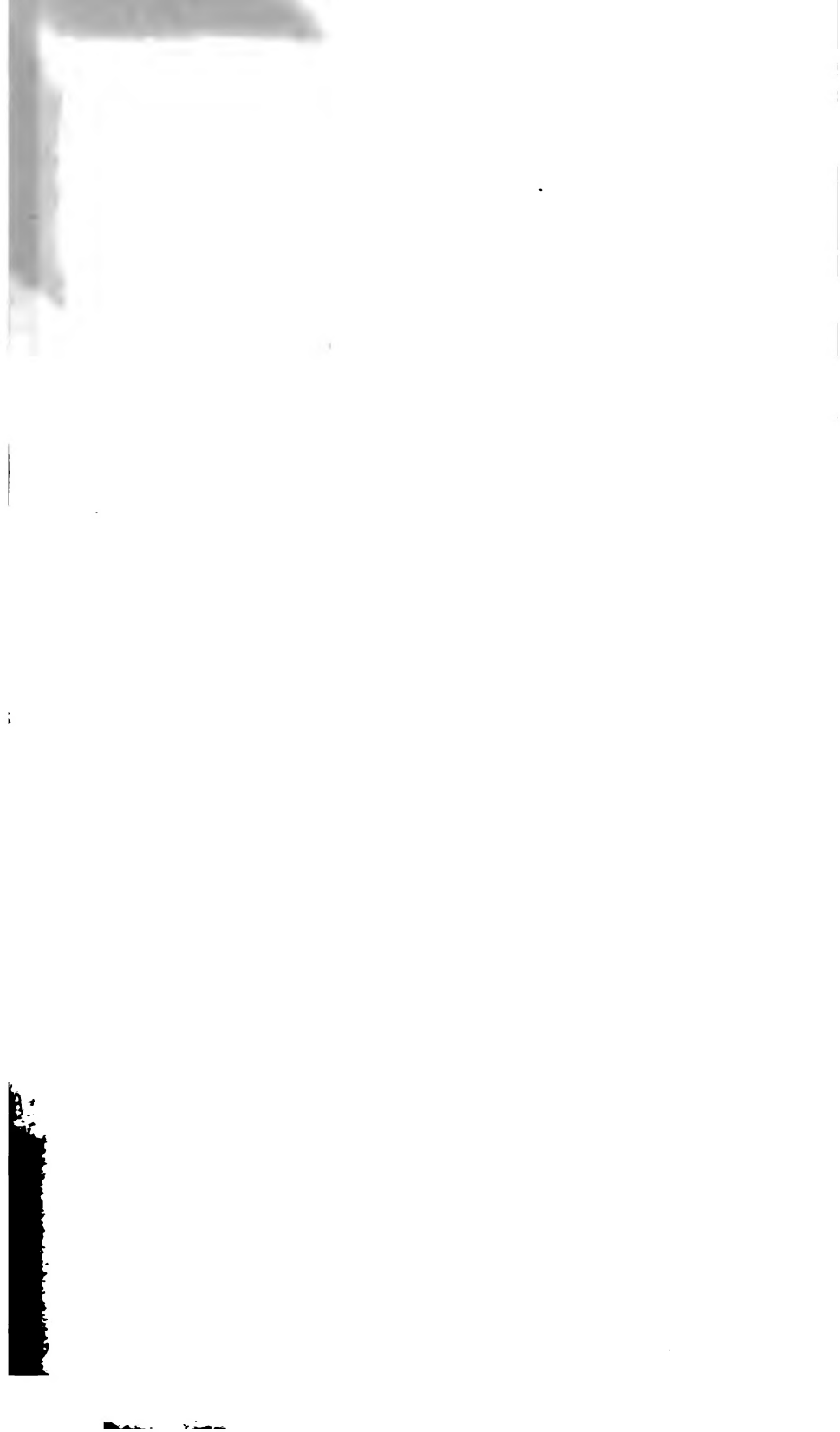
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

IN THE TIME OF

LORD CHANCELLOR HARDWICKE,

FROM THE YEAR 1746-7 TO 1755.

By FRANCIS VESEY, SENIOR, Esq.

Barrister at Law, and late one of the Masters of the High Court of Chancery in Ireland.

COMPRISING

REFERENCES TO THE REGISTRAR'S BOOKS, AND SUBSEQUENT DETERMINATIONS: ~~TOGETHER~~ WITH

A VERY

COPIOUS INDEX, NEWLY COMPILED.

IN TWO VOLUMES.

VOL. I.

By ROBERT BELT, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

FIRST AMERICAN, FROM THE LAST LONDON, EDITION.

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CASES

ARGUED AND DETERMINED

IN THE TIME OF

LORD CHANCELLOR HARDWICKE.

LEE v. D'ARANDA and COX, Hilary Vacation, 1746-7.

(Reg. Lib. 1746. B. fol. 359.)

S. C. 3 Atk. 419.—Husband covenants to give his wife by deed or will £1000 at his death if she survives him; but dies intestate. She is not entitled to her distributive share in addition to her claim under the covenant, Post, 519. *Barret v. Beckford*, July 1750.

THE husband covenanted by articles precedent to his marriage, to leave the wife by deed or will £1000 at his death, if she survived him; or that his executors should pay it to her within six months afterwards; he died intestate; and the question was, whether she was intitled to her distributive share of his personal estate, and also to £1000 out of it?

Lord Chancellor decreed, that if her share of the personal estate was of equal value to, or exceeded £1000, it should be a satisfaction, and she should not come in first as a creditor for that sum, and then for a moiety of the surplus. On the authority of *Blandy v. Widmore*, 2 Vern. 709. 1 P. Williams, 324, which was a direct case in point, and also on the reason of the thing. For when husbands create debts of this kind, the intention is, that she should have it without regarding the manner how: and the court leans against double satisfactions. Indeed where by agreement of parties the debt is made in the husband's life, then it must take place, and if unsatisfied at his death, is a breach; like the case of *Oliver*

v. Brighthouse (1), at the Rolls, December 1st, 1732, where the [2] husband covenanted to pay a sum within two years after marriage: and if he died, his executors should pay; he lived after the two years, and died leaving a larger sum. But here there was no pretence of a breach in the husband's life; there was no obligation on him to pay it; nor could an action at law, or bill in equity lie for it; which makes it differ from that case, where the covenant was not performed in his life; there is no difference, whether the husband covenants to leave, or that the executors shall pay. The debt must not be made in this court on such minute distinctions. In giving an account therefore of the personal estate, it is to be taken in as a debt.

(1) *Oliver v. Brighthouse*

(2) This case is not

Warr. 1 Bro.

reached, see
Ch. 246.

Haynes v.
3. 21.

A case on Mr. *Parson's* will was cited at the bar, where the question was, whether an orphanage share should be a performance of a covenant to pay? and it was held that it should not; because not in the father's power; from whence it was urged that in the present case it was a performance, because in the husband's power.

SCOTT v. MERRY, *Hilary Vacation*, 1746-7.

(Reg. Lib. 1746. B. fol. 473.)

Plaintiff having prevented the fulfilment of an agreement in favour of the defendant *M.* for purchasing the assignment of a mortgage, by obtaining it himself at an advance after notice, not allowed to take advantage of it; being *mala fides*, evidence therefore of a parol agreement read against him under these circumstances.(1).

LESSEE for years of the mortgaged premises agreed on the purchase of the mortgage for less than the original mortgage money, they being much decreased in value, and a guinea was paid in part, not as earnest; and he also bought in the equity of redemption; but before the agreement was fully executed, the plaintiff intervenes, and by offering the mortgagees somewhat more, takes the bargain out of his hands, and brought this bill to compel him to redeem on payment of the whole mortgage money, or be foreclosed.

It appeared clearly that the plaintiff had notice of the former agreement, nor was the want of notice charged in the bill; and on the plaintiff's counsel objecting to the reading evidence of the agreement till proved to be out of the statute of frauds, it was answered that the statute of frauds was not applicable to this case; for the court here is to consider on circumstances, whether the plaintiff is a purchaser *bonâ vel mala fide*; and *Richards v. Symes*,(2) was cited where such evidence was allowed to prove a debt discharged.

Lord Chancellor ordered it to be read, as it would let the court into those circumstances; and seeming to incline that the plaintiff, being a purchaser *mala fide*, should have only what he actually paid, he agreed to accept it.

(1) See *Cadman v. Horner*, 18 Ves. 10; and *Savage v. Brocksopp*, *ibid*, 335.

(2) Barn Ch. Rep. 90. and 2 Eq. Ab. 617. pl. 2.

[3] CARTE v. BALL, *Easter Term*, 1747.

(Reg. Lib. 1746. A. fol. 704.)

S. C. 3 Atk. 496. *quod vide*.—Vicar failing in a suit for tithes in kind, and a *modus* set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such a *modus*(3).

THE bill was brought by the plaintiff as administrator of his brother late vicar of *H.* for arrears of tithes in kind, due during the vicar's incumbency. The defence made was, that the vicar was never endowed; and

(3) As to this point the case of *tithes* seems almost peculiar. In *Durant v. Durant*, (however in 1 Cox. Ch. Ca. 58), the court gave parties a relief more beneficial than what they had prayed, though they claimed under a marriage settlement.

that there was a yearly composition by way of *Modus* of seventeen shillings in lieu of all manner of tithes, which the defendants attempted to prove by receipts of former vicars, and evidence that tithes in kind were not paid within the memory of man. The plaintiff was obliged to prove the endowment, as his brother was only vicar and not rector, which he offered to do by producing a grant in the year 1209, by the abbot and convent of *Lyra* in *Normandy*, to the vicar of this parish, as evidence of endowment of all manner of tithes; but it was not suffered to be read (1), as it was not shewn to have come out of that monastery. The plaintiff next produced three terriers; the first of which was in 1638, the reading of which was allowed as being evidence, though not conclusive: it never was disputed in the *Exchequer*, and even the parson's books have been read.

Lord Chancellor.

This is a very unusual demand: the question is, if the plaintiff has shewn an original right in the vicar to the payment of tithes in kind, and if the *Modus* be a sufficient bar thereto? The *Modus*, as stated by the answer, is not sufficiently laid even in point of law, nor is it sufficiently proved; the first objection thereto is, that no time of payment is shewn, that was formerly necessary in the *Exchequer*; but that court has since very justly departed from that rule; however, the saying it was to be paid yearly, is too uncertain; but the principal ground of the insufficiency of the *Modus* is, that it is not said by whom to be paid; which is necessary, in order to shew against whom the parson has remedy for that customary payment. [*Richards v. Evans*, post, 39, and *Mitchel v. Neal*, 2d Volume, 679.] Then considering it upon the evidence, there is no proof of an entire *Modus* of 17s. but only that it was paid separately and by contribution, nor do the receipts import a *Modus*. But as to the plaintiff's demand, this case stands in a different light; here is no evidence of payment of tithes in kind, which is more material in the case of a vicar than of a rector, who is of common right intitled to tithes; and non-payment cannot be alleged by prescription against him; but a vicar, being intitled to payment of tithes in kind against common right, must shew an endowment either actual or by collateral evidence of such usage; of which there is none here. The usage of this parish shews, there must have been some subsequent endowment; but as the original thereof cannot be read, the court must take it on the evidence produced, which does not prove that tithes in kind were ever paid; for the terriers are dark, and do [4] not import such payment, and I much question, whether there is any instance of a decree for such payment, where there is no evidence of it; though there might be in the case of a rector; therefore though the *Modus* is insufficient, there is sufficient in the defendant's answer to intitle him to object to the plaintiff's right; which he not having proved, he cannot have a decree: nor yet should his bill be dismissed, but some other way for relief be found. Let an issue be directed to try whether the vicar was in his life intitled to the payment of tithes in kind.

The plaintiff had time and opportunity given him to establish this an-

(1) It appears that a copy of the registry of the Bishop of *Lincoln* of the endowment of the vicarage in 1209, and an extract from a roll of institutions to benefices from that registry, were read at the hearing. R. L.

cient endowment, and to examine it by commission, which was not executed; the jury found, that the vicar in his life was not intitled to these tithes in kind; and the bill was, *July 17th, 1749*, dismissed with costs at law, but not in this court.

But *Lord Chancellor* then said, 'That as to the *Modus* which is admitted by the answer, the plaintiff is intitled to the arrears thereof, during his brother's life, notwithstanding the objection taken by the defendant that the bill was barely for tithes in kind, and the plaintiff himself insisted that the *Modus* was not good. An issue could not properly be directed on the *Modus*, because that would be admitting some kind of endowment or other, and excluding the other point; such an issue therefore was directed as would take in both. It often happens both in the ecclesiastical court and court of exchequer, that on the dismissing a bill brought barely for tithes in kind, the plaintiff may yet have a *decree* for a *Modus* admitted by the defendant's answer; and it is the same in this court, since it is a good *Modus* in its nature, and only imperfectly set forth in the answer, in not alleging that it was payable by the occupiers of the land; though there might be more in it if it was not good in its nature.

ELTON v. ELTON, *Easter Term, 1747.*

(Reg. Lib. 1746, A. fol. 396.)

S. C. 1 Wils. 159. & 3 Atk. 504. quod vide.—Devise of £1500 to a grand-daughter to be at her own disposal, if she married with the consent of her father and mother, or trustees, and not otherwise. She dies at thirteen intestate and unmarried; it is not vested nor transmissible(1).

A POWER was reserved under a marriage settlement to *Elizabeth Elton* (the plaintiff's sister,) of disposing of £1500 as she pleased to direct, if she died without issue by her then husband: and if she did not dispose of it, it was to go to Sir *A. Elton* her father. She died without issue, and without any directions; Sir *A. Elton*, thus intitled to it, made a will, wherein he says, that in pursuance of his daughter's request he gives this £1500 to *Hannah Elton* (the plaintiff's daughter) to be at her own disposal, if she married with consent of father and mother, or their trustees if they died before, and not otherwise. She died at the age of thirteen, intestate and unmarried; her father as her administrator brings this bill claiming the £1500 as an interest vested, and consequently transmissible.

[5] For the plaintiff. The case of *Peyton v. Bury*, 2 *Will. 626*, shews, that this could not be a condition precedent; for then it is uncertain, whether it would vest during the life of *Hannah Elton*, which could not be the intent; nor is it agreeable to the words, which give it her at her own disposal, and is inconsistent with the supposition of its not being due till marriage, which would put it out of her disposal; the natural construction therefore is as a condition, which would determine her interest

(1) Legacy to one on her attaining the age of twenty-eight, or marrying with consent. Devisee died before she attained the age of twenty-eight, having married without consent. Legacy held not to vest; 1 *Brown, 304*. In 2 *Atk. 184*, such a devise was held to be *in terrorem*, and that it vested on marriage; one of the contingencies happened, but Lord Loughborough doubted the authority of that case. In *Proc. Chan. 562*, such a devise was held only to be *in terrorem*, and to vest, notwithstanding marriage without consent, there being no limitation over. See also 1 *Atk. 500 & 381*.

on a breach; which never happening, by the act of God, the gift is become absolute: the words, *and not otherwise*, mean, that if she marries otherwise, she shall not have it, which is a condition subsequent; if therefore she does not marry contrary, she shall not be deprived of it. A prudential marriage was the testator's object, and not marriage only, as the defendant insists; the court will rather lean to vest the legacy, and use a latitude in the construction of conditions precedent or subsequent; for which no technical form of words is required; but supposing the words mean, she shall not have it if she does not marry with consent; it is clearly a condition *in terrorem* (1), which is not allowed in restraint of marriage, either in the civil or our law. In the case of *Ward v. Trig*, (2) in the *Exchequer*, *Easter term*, 1746, a father gave his daughter £400 if she married with her mother's consent; if otherwise, then to fall into the residue; the daughter died long after attaining her full age (3), and gave it to the plaintiff, and that court thought it a vested legacy, and that she had power to dispose of it. It was so likewise held in *Aston v. Aston*, 2 *Ver.* 452.

For the Defendant. A marriage in fact was necessary; so that never having vested, it falls into the estate of Sir *A. Elton* the grandfather, which is undisposed of. In *Atkins v. Hiccocks*, 1739, (4) one devised £200 to his daughter to be paid at her time of marriage, provided she married with consent: she lived till after the age of 21, but died unmarried; it was adjudged, that the legacy never vested, because there was no marriage. So it was held at the Rolls in *Garbut v. Hilton*, *Nov.* 26th, 1739, (5) where a legacy was given to the plaintiff, provided she married with consent of her father and mother, or the survivor of them: she brought a bill to have it raised, which was dismissed; she not being intitled thereto before marriage, which was necessary, though consent was not.

LORD CHANCELLOR.

This is a very strong case against the plaintiff, it was a gift moving from the bounty of the grandfather; for it was his own, though he recites as disposing it pursuant to request. The question, whether it was vested at the death of *Hannah Elton*, depends on the construction of the clause in the will, and on authorities: and it is clear from the words, that it is a condition precedent to the vesting; or at least a time or event when to be paid, and therefore no difference whether precedent or [6] subsequent, but it cannot be subsequent; because the money was to be given her upon her marriage; and if the words are transposed, still that time or event is annexed to the body or substance of the legacy. The civil law does not admit the difference between conditions precedent and subsequent, for there it is all void [*Cray v. Willis*, 2 *P. Will.* 531. also 528, 628]. But both this court and the civil law requires a marriage to be had in all those cases; for the substance must be performed, taking it as a condition or event of payment, for *dies incertus facit conditionem*, (6) and where the time of payment is certain, it is transmissible to the executor although the legatee dies before; but where the time or event is uncertain, the tes-

(1) But see 1 *Atk.* 502.

(3) Without having ever been married. See 3 *Atk.* 505.

(4) 1 *Atk.* 500.

(6) See 1 *Atk.* 501, and 3 *Atk.* 506.

(2) Stated also 3 *Atk.* 505.

(5) 1 *Atk.* 381.

tator must have had that in view. Nor is there any inference to be drawn from the words *to be at her own disposal*; for it may be a question, whether those words do not mean to her separate use; but without entering into that, it might be so stipulated upon her marriage; the construction of the words *and not otherwise*, according to the meaning insisted on for the plaintiff, would apply them to part only, *viz.* the consent and approbation. *Atkins v. Hiccocks* was determined on the same foundation, but this is stronger; there it was a portion given by a father: which case the court distinguishes, he being bound from nature to provide for a child, and will make as strict a construction as possible to comply therewith, and will decree a surrender of a copyhold to be made good: but not so in the case of a grandfather, where it is merely a bounty; and in that case it was an annuity given in the mean time, the daughter being intitled to the interest, and therefore there was some reason to think the legacy vested. But it is otherwise here, for the court will not give interest to a grand-daughter in the mean time; which is an answer to the objection that she might wait several years before it might vest: and if she had brought a bill immediately upon the death of the grandfather, the court would not have decreed it for her. Abstracted therefore from other circumstances, the plaintiff is not intitled; but from the whole frame of the will, this construction was the intent of the testator, *viz.* to advance her in marriage (1).

(1) The bill dismissed accordingly, R. L.

WELFORD v. BEEZELY, May 23, 1747.

(Reg. Lib. 1746. B. fol. 365.)

B. C. 3 Atk. 503. Vide ibid. 501.—A mother agreeing to give her daughter £1000, which by the daughter's marriage articles was to be settled for her separate use decreed to perform it. Her signature to those articles as a witness (she knowing the contents) is sufficient evidence of the agreement therein recited within the statute of frauds, although she was not in terms a party to them (2). Mutual credit under copartnership agreement.

THIS case came before the court on three bills, the first by the wife of *John Welford* against her mother, making her husband co-defendant for a portion of £1000 and interest; which was by the plaintiff's marriage articles to be settled to her separate use with the interest; if the husband survived her, then to go to him, if she did not dispose of it. December 11th, 1745, the Master of the Rolls decreed the mother to lay out £1000 on the trust in the marriage articles, and pay it to the plaintiff her daughter with costs, and an account of what was due for interest. The

[7] second bill was brought a great while afterwards by the mother against both her daughter and the husband and trustee, to have an account of a partnership in trade entered into between her and *John Welford* her son-in-law, upon suggestion that she had made satisfaction for that £1000 by allowing him credit for so much for part of his share in the stock, which he was obliged to put in, and should therefore indemnify her. The third bill was by the husband alone against his mother-in-law, and *J. B.* her son, the other partner, to have an account of the stock and

(2) See also the report in *Atk. & 1 P. W. 771* note (1.)

trade; the original cause was afterwards reheard, and the other two causes came on at the same time in *June* 1746, before the Master of the Rolls; who, affirming his *decree*, directed [in the other cause] an inquiry into the partnership and an account.

On these two *decrees* it came now before *Lord Chancellor*, who said, the great difficulty attending the complete justice of this case arises from the great dexterity used in splitting and dividing it on one hand, and the unskilful defence made on the other. The first general question arising on the first *decree* is, whether the *defendant* the mother, on the foot of these articles should pay £1000 with interest to her daughter? on the other *decree* the second question is, whether the defendant *John Welford* must be considered as having received satisfaction for that £1000 as paid to him, and should indemnify the mother? The first question depends on these considerations. First, whether the mother is proved to have known and agreed to these marriage articles; and if so, whether she ought to be bound on the foot of the statute of frauds. I am of opinion, that it is plain, that she knew of, and agreed to them (1); she admits her knowing of the treaty, and that she agreed to give £1000 portion to be settled to the separate use of the wife, and that she was privy and consented to the actual marriage which took place soon after; being prevailed on by his being represented to be in good circumstances. It is true, that she was not a party; and it is therefore insisted, that her signing as a subscribing witness, was not with an intent to be bound or to know the contents; and I do not think, that the bare attesting a deed as a witness will create such a presumption of his knowledge of the contents, as to affect him with any fraud therein; for a witness is only to authenticate it, and not to be presumed privy to the contents: but that is not the present case, for her knowing the contents is proved here, from undeniable evidence, and still stronger from the circumstances of the case: this being supposed, the next consideration is on the statute of frauds; whether signing as a witness is a sufficient signing within that statute to bind her? It is urged as very strange, that she, from whom the money was to move, was not made party; and that is certainly very odd: but there is no evidence that she was asked and declined it, and perhaps they thought her knowledge and attestation was sufficient; and so it is even within the words of the statute, the meaning of which was to reduce contracts to certainty, and to prevent fraud. Even in courts of law, where the circumstances of the statute have been materially complied with, form [8] has not been insisted upon; and signing as a party, means a person being bound thereby; or else what would become of the *decrees* in this court founded on letters; where though the person did not intend to be bound, the court would bind him: and even a letter sent to an agent has been understood as a sufficient signing within the statute; for signing is all that is necessary. The case of *Bawds v. Amhurst*, in *Chan. Prec.* 403, cited for the defendant, is no impeachment of this doctrine, for there was no signing, and so undoubtedly could not be a good agreement; for where it is only a sketch or draft, and not completed by signing, though it is all in the party's own hand-writing, it is not good: but this is complete, and not merely a draft, I will go further, and if it was not so strong, would carry

(1) She had denied all knowledge of them by her answer.

it into execution on the foot of the fraud; as in the case of *Mallet v. Halfpenny*, *Chan. Prec.* 403, 2 *Vern.* 373.; it is therefore sufficient to bind her, supposing she knew not the contents. The daughter is as much a purchaser for valuable consideration as her husband, and perhaps would not have consented to the match, but on those terms: but there is another circumstance in this case, which would be sufficient for the plaintiff, viz. that she has notice of the trust declared on this £1000, whereby it became trust money; and consequently she is bound and affected as the person in whose hands the fund is, for this particular purpose; upon a general trust, indeed, the trustee is only bound to see to an application.

As to the second question, whether *John Welford* the husband should indemnify the mother, I think it sufficiently appears by the evidence, that credit was given to the husband for this £1000, in admitting him into the partnership, and that it was so meant by the agreement between him and the mother; and unless this is looked on as an allowance of it to him, there is no other way of accounting for the long delay of any demand, though interest was payable immediately: if then really brought into that partnership (though it would not bind the wife, unless she consented, which does not appear,) it is equal to an actual payment, for he has the same benefit, and if it appeared immediately what that particular stock was, I would decree him immediately to indemnify the mother; both being affected with the trust, and she paying the whole trust money to him: but as he objects, that no account was taken of the stock, till when the value does not appear, it would be too hard to decree him to indemnify her, when it may happen on the account taken, that he has not received satisfaction for it; though there is strong probability, that he has. But to make her safe in all events, he shall pay into the bank whatever she shall be obliged to pay the daughter, indemnify her to the extent of what he has received, and abide by the account.

[9] WHELPDALE v. COOKSON, *Easter Term*, 1747.

(Reg. Lib. 1746. B. fol. 552.)

Trustee not to derive advantage from a purchase of trust property.

On devise of lands in trust for payment of debts, the trustee himself purchases part.

Lord Chancellor said, he would not allow it to stand good, although another person being the best bidder bought it for him at a public sale; for he knew the dangerous consequences: nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it; but if the majority of the creditors agree to allow it, he should not be afraid of making the precedent(1).

(1) The substance of the decree is in 5 *Ves.* 682. To which add *Gibson v. Jeyes*, 6 *Ves.* 266. *Wood v. Downes*, 18 *Ves.* 120. *Montesquieu v. Sandys*. 18 *Ves.* 302, 313

FLANDERS v. CLARK, *Easter Term, 1747.*

(Reg. Lib. 1746. A. fol. 666.)

S. C. 3 Atk. 509.—Legacy to *J. F.* the principal to be paid as her executors should judge necessary for him; but that he should not give it to his wife; and if *he died without issue*, that it should revert to testatrix's family: giving interest, however in the "mean time for what should continue in the executors hands till all was paid." A surviving legacy within two years. The discretionary power survived, having been given to the parties *quod* executors, and the whole property vested by the direction.

Margaret Flanders by a clause in her will gave £150 to her son, the principal to be paid by her executors at such time and proportion as they please; but that he should not dispose of it to any present or future wife; but if he died without issue, then it should revert to the testatrix's family, and interest, at the rate of 5 per cent. to be paid by the executors for what should be in their hands till the whole be paid. The surviving executor directs it to be paid after a certain time to the son with interest: which time was now expired (*a*).

It was insisted, that he should have no more than an estate for life in it, and not vested immediately, but the payment suspended till his dying without issue at his death; which, as it is personal estate, must be the construction of the words. Then the contingency is good, on which it was to revert to the testatrix's family: nor has the power been executed in fact, for it should have been by both executors, and an execution by one, though the survivor, is not sufficient.

LORD CHANCELLOR.

The penning of this is particular, so that it cannot be determined on any general rule, but on particular circumstances. If the clause had rested on the first part, I should have thought it should go to him as an usufructuary interest during life only, and then over: but the construction must also be on the other part of the clause, directing the executor to pay interest till the whole was paid; which shews, the testatrix meant it for his personal benefit: but she had a view that he might die, before he made use of it, and therefore that he should not dispose of it from her family. It may be objected, that payment by the executors meant by way of loan, but then the executors must have taken security from him; which she did not mean he should give. I doubt of the rule insisted on, that one executor cannot execute in this case; for the power is [10] given to the executor of the personal estate, as executor; and there is no case where one executor's death determines the execution: and if that surviving executor had not disposed of it (1), it would have devolved on the court to have done it. In the case of the *Attorney General*, at the relation of the *Goldsmith's Company v. Hall*, which is well reported in a book, (though not of authority) called *Fitzgibbon's Reports*, [314,] the testator gave to his son his personal estate, and if he died without issue, then so much as shall remain, to the *Goldsmith's Company*: the son died with issue, and it was insisted, that he had only an usufructuary interest, and so to go over: but it was determined by Lord King,

(a) Vide post, 133, 154. Bequest to one, and in case of her demise over, devisee takes only for life. 1 Brown, 393. Personal legacy to *A.* after the death of *B.* without lawful issue, held too remote, and the whole vests in *B.* 2 Brown, 33. [See also 2 Atk. 89, note.]

(1) See *Attorney General v. Glegg*, 1 Atk. 356, and *Jacomb v. Harwood*, post, Vol. 2, p. 265.

that he had the absolute property, and therefore the devise was void; for he had power to spend the whole, which was an absolute gift (b). The present case is stronger; for here he is now living, and therefore has the whole property agreeable to the intent of the testatrix.

The legacy was decreed to him without any security.

(b) Devise to testator's wife, *not doubting* she will give what is left to his grand-children, not sufficiently certain to raise a trust; 1 Brown, 179.

RIDOUT v. PAYNE, *May*, 1747.

(Reg. Lib. 1746. B. fol. 508.)

S. C. 3. Atk. 486. quod vide for a full statement of the case, argument, and decree.—Devise of all the remainder of testator's goods and real estates, will pass all his interest and the inheritance in the lands, including reservations; although the devisee had a devise of an estate for life in part of the latter.

Award may be relieved against where a clear mistake in fact or law (1).

THE bill was brought by husband and wife to be relieved against the conveyance of an estate suggested to be settled contrary to the will of her former husband, from whom it moved; who was seised of a personal, and also of a real estate, consisting of several parcels, upon part of which his wife had a jointure; and reciting the same not to be a sufficient provision for her living hospitably, he devised other lands to her for life, remainder to his brother and heir-at law; to whom also he devised other lands in tail, remainder to his right heirs; and then devised to his said wife, whom he made executrix, all the rest and remainder of his goods, chattels, and personal estate, together with his real estate not before devised (2).

Controversies arising between the widow and the heir at law, they were referred to arbitrators, who made an award, to which the parties agreed; in which no particular uses were directed, but that the lands should be settled according to the intent of the will, and conveyances were made to carry that award into execution. The bill was to have the conveyance rectified, as having limited some of the lands contrary to the intention of the will, viz. to the wife for life, remainder to the heir at law.

LORD CHANCELLOR.

The bequest is, whether the plaintiff is entitled to this equity? which will depend on the true construction of the will, and what [11] estate and interest the plaintiff took thereby. Then supposing that is with her, whether the agreement and subsequent deed will create any thing to bar her?

The first question naturally divides itself into two others. The first relating to two parcels of land not taken notice of in the will, whether the reversion of them passes by the residuary clause? which will admit of no dispute. They plainly do pass: the words *real estate* carrying land, and also the inheritance of that land, though accompanied with other words, as goods and chattels, &c. which is not contrary to *Marchant v. Twisden*, *Eq. Ab.* 211; for there the intent was only to carry personal estates. And in the *Countess of Bridgewater v. Duke of Bolton*, well reported in a book

(1) See the notes to *Chicot v. Lequesne*, 2 Vol. 315.

(2) See the report in *Atkyns*.

of no great repute; 7 *Mod.* 106. the words *real estate* will pass not only the thing, but also the testator's interest therein (3). The second question is, whether the reversion of the two other parcels, devised to the plaintiff for life, is included in the residuary clause? It is included; for the reversion upon particular estates will pass by the words, *lands, messuages, tenements, and hereditaments*, as in *Wheeler v. Walrond*, *Alleyn* 28, *Chester v. Chester**, and 2 *Vent.* 285, and several other cases. The question therefore is, whether there is any thing particular here, to take it out of this general rule? The first objection is taken from the testator's recital; whereby it seems, he intended a provision for her life only; but that is inferring too much; for the residuary clause had passed an estate of an inheritance to her before, as already mentioned. The second objection is, that it is inconsistent for the testator to give her the same thing for life, and afterwards absolutely: and that the cases above cited, were, where it was to several persons. But when a will gives a particular interest, and afterwards a general interest, it has not been determined that the general gift shall be excluded. Suppose a gift to *A.* and his heirs, then to *B.* and his heirs; they shall be joint-tenants, the latter devise not revoking the former; notwithstanding some old opinions to the contrary. In *Hopewell v. Ackland*, *Com.* 164. 1. *Sal.* 239. and *Scot v. Albury*, *Com.* 377. the latter words carried the reversion in fee of lands before given. Besides there is a particular argument for the plaintiff, that the testator in other lands has limited them to his wife for life, remainder to her heir at law, and thereby pointed out what particular part of the inheritance should go to him.

The second question is, whether this agreement stands in her way, as it is objected it shall, because the parties are bound by the *award*; and that the court cannot intermeddle, for then there could be no compound suits: for which is cited *Cann v. Cann*, 1 *Will.* 723, but that is not like this case; for suppose it depended on the award, if arbitrators are mistaken in a matter of law, it is enough to set it aside, 2 *Vern.* 705, and *Metcalf v. Ives*, *June* 18, 1737; but here they have awarded [12] the estate to be settled to the uses of the will, without specifying any particular uses: but the conveyance has limited them contrary to the will, and so contrary to the award.

The plaintiff therefore is entitled to have it rectified.

* *Cowp.* 808, 299. *Proc. Chan.* 202. 3 *Wms.* 56, 63. 3 *Atk.* 486. *Post.* 228. 2 *Vol.* 48.

(3) See the note to *Mr. Sanders'* edition of *Atkyns*, in the principal case.

CITY OF LONDON v. NASH, May 1747.

(Reg. Lib. 1746. B. fol. 475.)

S. C. 3 *Atk.* 512. reported more fully, *quod vide*.—Lessee covenanting to rebuild several houses, does not perform it by rebuilding some and repairing others, although at a considerable expence (1). Issue directed of *quantum damnificatus*.

THE bill was brought to have a specific performance of an agreement in a lease of some old houses, made with *G. Graves* the original lessee of the premises, which were now vested in the defendant. The covenant was within three years to build brick messuages on the premises demised.

(1) Though Lord *Thurlow*, *C.* disapproved of the courts interfering on such covenants, (3 *Bro.* 166. and 1 *Ves. jun.* 235.) the courts since his time have adhered to the precedents.

The defendant insisted, that he had satisfied the covenant by building in the plural number two houses, and only repairing the rest.

The first point was, as to the true intent and construction of the covenant in the lease? The second, whether it had been sufficiently performed?

LORD CHANCELLOR.

As to the first it was plainly intended to let on a building lease, which is for 61 years at least; not at a repairing lease, which can only be for 21 years. The words *or any part thereof* were in the covenant in the draft, but rejected in the lease itself very properly, which shews, that the meaning of the covenant was that all the messuages should be new-built: for an indefinite proposition is equal to an universal one; and the whole seems to mean a building lease. If therefore an action at law had been brought upon this covenant, and a breach assigned; and *Graves* had pleaded performance by building only two new messuages, that plea would not be allowed. But this court has power to go further, and see what was the intent, supposing no lease had been executed: upon a bill for a specific performance the court would decree the whole to be built: the lease appears not to have been made in a proper manner; for *Graves* did not take it for his own benefit, but as trustee for the defendant to whom it was assigned for 5*s.* consideration: and who was at the time one of the committee for letting the city lands; and his scheme plainly was to get a longer term upon repairing the houses only.

As to the second point, it has not been performed by *Graves* or the defendant; for though the houses have been largely repaired and new fronted, &c. that is different from new building. The first defence made is, that the plaintiff should not come here for a specific performance, but be left to a court of law. But I am of opinion, that upon a covenant to rebuild, the landlord may come here for a specific performance; as the not building takes away his security: but upon a covenant to repair he may have damages at law. The most material objection for

[13] the defendant, and which has weight with me, is, that the court is not obliged to decree a specific performance, and will not, where it would be a hardship; as it would be here upon the defendant (supposing he meant an evasion) to oblige him, after having very largely repaired the houses, to pull them down and rebuild them; which would be to decree destruction, and would be a public loss, and no benefit to the plaintiffs, who only want to be repaired in damages, which will be sufficient satisfaction to them.

Let the parties therefore proceed to a trial at law, to see what damages the plaintiffs have sustained.

HAWES v. HAWES, *Trinity Term, July 26, 1747.*

(Reg. Lib. 1746. A. fol. 707.)

S. C. 3 *Atk.* 524, and 1 *Wils.* 165.—Devise of lands to four younger children equally, share and share alike as tenants in common and not as joint tenants, with benefit of survivorship. This referring to a former survivorship, is a tenancy in common, with a limitation to the survivors, after the death of any of them before 21, without issue. See *Mendes v. Mendes*, post, 89; and *Stones v. Heurthy*, 165. Also, 3 *Atk.* 524. 1 *W. P.* 96. 2 *W. P.* 280. 3 *Burr.* 1881.

Where on death of one tenant in common before 21 it survived.

Construing or transposition of words in a will.

A. HAWES the plaintiff's grandfather made a will, and reciting that he

was a freeman of *London*, devises so soon after his decease as the children required, his customary part (1) to his five children, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, with benefit of survivorship. He then gave his testamentary part to his four younger children in the same words, with like benefit of survivorship; and lastly gave his real estate to his four younger children and their heirs, in the same words, with benefit of survivorship. *H. Hawes* his son, and the plaintiff's father, afterward devises his land to a trustee and his heirs on trust to pay debts by sale; and the residue unsold (or the whole, if the personal estate was sufficient for such payment) to his three children (2) and their heirs, when he, she, and they, attained the age of twenty-one or marriage, equally to be divided between them share and share alike, as tenants in common, and not as joint-tenants, with benefit of survivorship; and directs the rents and profits to be for their maintenance and education during their minority. One of the three children died before full age or marriage. Two questions arose, First, whether the words of these wills constitute a tenancy in common or joint-tenancy? Secondly, what shall become of the deceased child's share?

LORD CHANCELLOR.

On the general reasoning and authorities, this case is clear for the plaintiff; but what weighs most with me, is the particular circumstance of these wills, from the connection between the different clauses. The first question is, whether the four children take in joint-tenancy or in common, generally or attended with a particular limitation over on a contingency? It is true, that joint-tenancies are not favoured here; as introducing inconvenient estates, and making no provision for families: and now courts of law also lean against them; though formerly it was [14] said by *C. J. Holt*, that they were favoured, which was on a technical reason, because the law was averse to multiplication of tenures and services; which being now reduced to *socage*, and no burthen, the construction is the same in all courts [by stat. 12 Car. 2. c. 24]. Other principles that have been drawn are also true, viz. that where the words of a will are inconsistent, the court must make a consistent construction, and to that end reject such as appear to be least consistent with the intent; but not if it be possible to make all consistent. This is an immediate devise in fee, to all equally; which words in a will import a tenancy in common, if no more; but beside, there are positive and affirmative words of a tenancy in common, and negative of joint-tenancy; which plain and express words shall not be overturned by the subsequent ambiguous words *with benefit of survivorship*. The question then is, what construction is to be put on them? Two constructions have been attempted: the first, as if they meant the same as *without benefit of survivorship*, which in some cases has been done, as in *and out of settlement* have been construed the same; and it has been therefore argued, that they are only an explanation of what joint-tenancy is, and that the sense would be plain by removing the comma. But the construction will not do here, where survivor-

(1) The recital, and what relates to the customary and testamentary parts, which are relied on in the judgment, are not stated in R. L.

(2) "Equally to his three children, and their heirs, as tenants in common, and to the survivor of them, and the heirs of such survivors, when they should attain their ages of twenty-one years, or marriage, with benefit, &c." R. L.

ship is a quality of joint-tenancy; and it is too refined, and not agreeable to the testator's intent in the former part of the will, where he uses these words to give, and not to take away an effect; and it is unnatural to suppose that he meant them in an uncommon and different sense from what he did before. The second construction attempted is, that these words mean a surviving the testator; to prevent a lapse, if any of the children died in the life of testator, according to the case of *Bindon v. Lord Suffolk*, 1 Will. 96. This certainly is not a natural way of explaining the testator's intent; as one seldom provides by will for contingencies that are to happen in his life; but if no other reasonable construction can be found, the court might resort to this. I think, Lord Cowper's reasoning in *Bindon v. Lord Suffolk* very right; that the surviving must be applied to some particular time, and not to a dying indefinitely. He thought, dying in the testator's life was the time intended; but the House of Lords thought it was the time of payment, from the nature of the debt; but both concurred that there should be some particular time. The question then is, if there can be any other construction upon this will than Lord Cowper's? for if not, his shall prevail, though not a natural one; the disposition of the customary part seems to be a key to the will, where he could not mean a survivorship of himself; the words in the beginning shewing that it must be after his death, and at such a time as it should attach, viz. at the age of twenty-one when the child might call for his share; and if afterward any of the others died before the age of twenty-one or marriage, might be entitled to part of his share. The use of these words therefore exclude any other construction. Then the

[15] word *like* in the bequest of his personal estate, refers it to the customary survivorship, and amounts to expressly saying, if any die before twenty-one or marriage, to go to the survivors; which affords a great light in the construction of the devise of the real estate, which follows the testamentary clause, and must mean the same survivorship intended there, though the word *like* is not inserted; for he can mean no other, as he is making a provision for the same children, than that if one died before he could use it, it should not be misapplied, but go to the rest, which is a very natural and reasonable construction, such as even courts of law would make to construe the same words in the same sense. Nor is this contrary to the express affirmative and negative words before; for they shall still have their effect on this contingency. It is said, this is proceeding arbitrarily and by conjecture; but the construction insisted on for the plaintiff is conjecture too; and I should comply therewith, if there was not another more reasonable and natural construction. This case therefore stands on its own circumstances divested of all authorities, yet consistent with all; particularly *Bindon v. Lord Suffolk*.

The second question arises on the will of *H. Hawes*. The heir at law is hereby disinherited as to the legal estate, and the question is, at what time this is vested in the children? they must take as tenants in common, for a joint-tenancy is excluded; it not being the intent to suspend the conveyance till all attained twenty-one; since that would introduce the inconveniences mentioned on the part of the plaintiff as the profits were only payable during minority. For if it did not vest till all attained twenty-one, when the eldest comes of age, what is to become of the profits, for he is only to have them till capable of taking? The word *and*

must therefore be taken distinctively *or* : viz. when, he, she, or they ; to whom then shall the share of the deceased child go ? I am of an opinion, that it should survive to the rest, and not descend to his heir [2 Vol. 258.] : nor is this contrary to a tenancy in common, for at this time limited, viz. their respective ages of twenty-one, they shall be so, but not entitled to a conveyance before. The words must be transposed, as the direction of the profits came first ; and then there would clearly have been a joint-tenancy of the profits during minority ; for they were constituting a fund for younger children, which shall not be lessened by giving the profits of the deceased child to the heir, but go to the rest. [1 *Brown*, 118 ; 2 *Brown*, 18. Post, 106.]

ELLIOT v. COLLIER, July 1, 1747.

(Reg. Lib. 1746, A. fol. 563.)

S. C. 3 *Atk.* 526.—Executor of husband who survived his wife but did not take out administration, is intitled to her share under the custom of *London*, and her administrator is but a trustee for him. Personal presents, &c. no advancement so as to bar the customary share ; neither was maintenance, though after marriage ; the same being charged against her as a debt under the will.

What is an advancement, on the custom of *London*. 2d Vol. 592.

Advancement on the statute of distribution or custom is just the same. 3 *Atk.* 213.

A FREEMAN of *London* dies, leaving no wife, but two daughters, declaring by his will that they were sufficiently advanced in his life by marriage or otherwise, and therefore his estate, notwithstanding the custom, was subject to his will ; appointing the defendant *Collier*, who had married one daughter, executor and residuary legatee ; directing the other daughter to execute a release to *Collier* of her right to a customary share, and that for want of acquiescing therein (1) she should allow £25 *per annum* for the testator's maintaining her from her first husband's [16] death. The representative of her second husband, who survived her, but took out no administration, brings a bill for an account and satisfaction for her orphanage share.

The first objection was, that it never having vested in the husband it was not transmissible to his representative : for which was cited *Graisbrook v. Fox*, *Plowden*, [278 b.] and *Hole v. Dolman*, *Mich. term*, 1736, where it was so adjudged at the *Commons*, and that the next of kin was intitled under the statutes of E. 3. and H. 8. [31 *Ed.* 3. c. 11. and 21 *H.* c. 5.] The second objection was upon the custom that she had been already fully advanced.

LORD CHANCELLOR.

Whoever takes out administration, can be but trustee for the husband, for here the right does not follow the administration ; which, though the spiritual court may think themselves obligated to grant to the next of kin, that does not bind the right, which was vested in the husband here, though he took not out administration, and is transmissible to his representative ; the ground of which is, that the husband has been determined not to be

(1) "A freehold estate he had given her should cease," &c. R. L.

within the provision of the statute of distribution: for he himself is intitled to all the personal estate of his wife, and shall not be obliged to distribute; therefore though he took not out administration, still he has the right. There are several cases, where the spiritual court grant administration, which here is only considered as a trust for those who are intitled. For suppose the wife survived the husband, the father's personal estate would have survived to her, except such part as the husband had reduced into possession, for which she would be only trustee to him, though intitled to take out administration to the father. This court considers an administration *de bonis non* as a trustee; and there are several cases, where the right has not followed the administration.

As to the other objection: where a freeman leaves no wife, one moiety of his personal estate is to be divided among the children; the other subject to his will. But since the case of *Box v. Chase*, *Eq. Ab.* 155. if any child has been advanced in the testator's life, though not with a full share; yet if the certainty of the advancement does not appear under the father's hand such child is barred; the ground of which is partly on the difficulty of taking an account after such a length of time; but principally because you do not know what to bring into *Hotchpot*; and if it does not appear what the sum was, the other children might be wronged (1). But here the evidence does not come up to such advancement; the gold watch and other furniture he gave her, are but personal presents, and cannot be taken as an advancement; 3 *Will.* 317 (2). which must be something by way of

[17] portion or preferment to set the child up with (3); so that a small sum, as £40 or £50 (he being a man of substance) would not be deemed an advancement, and here he disapproved of the match, and cannot be intended to prefer her: and as to the objection that this custom being contrary to the common law, should be construed strictly, it is not unreasonable in its origin; and I will never strain to exclude a child, unless he received such an advancement as would make it unreasonable for him to come here [1 *Eq. Ab.* 159. 1 *Atk.* 63]. Indeed in the case of a wife, depending on the marriage agreement, such a strain might be made. It is objected, that the maintaining her should be such an advancement as will bar: but it was determined in *Edwards v. Freeman*, 2 *Wm.* 536. *Eq. Ab.* 249, that alimnt by a parent to a child is no advancement: and though the question there was on the statute of distribution, there is no difference; advancement, whether on the statute or custom, being just the same. Indeed the alimnt there was before marriage; and therefore strictly considered should be taken as an advancement; but I am afraid of breaking in upon that rule; therefore think it better to charge her with it as a debt on the father's will, which is a good evidence on what terms he maintained her, and is an answer to the case *Stanhope v. Stanhope* cited, where a mother was insisting on every little gratuity given to her son, (who had devised his estate, in a manner she did not like), as a loan; and the court would not allow her any thing, that was not intended originally as a loan. So it is an answer to another case, *Hern v. Barber*, where there was a covenant entered into on marriage, to pay so much to the husband and wife for maintenance; which was decreed an advancement; but it was there said, that

(1) *Fawcner v. Watts*, 1 *Atk.* 405, 6, and the cases there cited.

(2) Note (o). See also 1 *Atk.* 403. & 3 *Atk.* 450.

(3) 3 *Atk.* 213. & *Ibid.* 450.

a common maintenance should not be considered in that light. But here the father shews in what light he would have it considered; and might have given it to her on what terms he pleased; and it would be unreasonable and unequal, if she did not make some allowance. But I shall not determine it on the sum (£25), in the father's will, but direct the master to see what is reasonable.

LADY HEAD v. SIR FRANCIS HEAD, July 3, 1747.

(Reg. Lib. 1746. A. fol. 626.)

S. C. 3 Atk. 295. and 547. on this point, and Ibid. 511. on another.—The court never decrees an establishment of a separation between husband and wife without some agreement, and the agreement here being only for an occasional absence, and the husband offering by his answer to receive and maintain her, the arrears of the maintenance were decreed to her if she returned in a month.

SOME difference having arisen between the plaintiff and her husband the defendant, occasioned by a disorder of mind under which she laboured, she left him: upon which he wrote her a letter (1) agreeing to pay her £400 *per ann.* quarterly, while they should live separate. But afterward, upon his writing to her to return home and live with him, and her refusal, he discontinued the payment, and endeavoured to seize and confine her in a mad-house; which she avoiding, on a *supplicavit* out of this court, a recognizance was given by him for the safety of her person. And she now by her *prochein amy* brings a bill against the husband [18] for the establishment of this agreement for a separation, and for a continuance of the payment. The cause stood over several days in hopes of an accommodation; but without effect.

LORD CHANCELLOR.

There are two questions; the first, Whether it appears there ever was any agreement to live separate, and that absolutely during the separation he should pay her £400 *per ann.*? The second, Whether any thing has since happened to put an end to the payment? As to the first, I think clearly, there has been no such agreement proved here: the only foundation for it is the husband's letter; which is only, that he will continue the payment while they live separate; but no certain time how long the separation should last. But if there were any doubt on this letter, it is clear from the evidence, that it was looked upon only as an occasional absence, not an absolute separation.

As to the second question, of the consequence, I will consider it under two parts. First, What effect the husband's acts will have on that general decree prayed for by the plaintiff? Next, What effect on the arrears of the maintenance for the time past? As to the first, it is a final answer on the circumstances of this case, to the prayer of her bill; for this court never decreed an establishment of a separation between husband and wife, without some agreement for that purpose; and in the light it appears here it is only an agreement for a maintenance during an occasional absence; then by the acts since done, he has not departed from the right of cohabi-

(1) It is stated verbatim in 3 Atk. 547; in which report the case is more accurate and full.

tation, but sent to her to come home. And supposing there were some circumstances inducing her not to come home; yet here is by his answer a judicial offer to receive and maintain her. The court therefore cannot decree a separation, since he has not behaved so as to forfeit his right (1), or cause the spiritual court to decree alimony. But supposing he had, she ought to sue in the spiritual court, not here, for divorce and alimony. Then to consider it on the merits. Here are acts of cruelty alleged in endeavouring to confine her, and also the *supplicavit* and recognizance, (which the court on application refused to discharge) as sufficient reasons to induce her not to go home; but I think not so far as to decree a separate maintenance: I am unwilling to speak positively relating to her disorder, which may deserve another name; but the proofs on the husband's part are very strong, that it was a very unfortunate infirmity; so that it is indifferent from what cause it arose. Whether he acted prudently or no is another question. Although he might have used a more proper method at first; yet his endeavouring to confine her is not such an act of cruelty, as will be a ground for an absolute and perpetual separation; though she swears the peace against him, even supposing he had beat her; for he may repent. Agreeably to which are the rules in the ecclesiastical court, and the case of *Whorewood v. Whorewood*, 1 Chan. Ca. 250 (2), where there was a separation in fact, and maintenance agreed on: yet Lord *Bridgman* suspended the payment, on her refusing to be reconciled. But Lord *Shaftsbury* chose rather to leave it to the ecclesiastical court. Sir *Leoline Jenkins's* life 723. But as to the arrears, they must be decreed to her; and this is consistent with my opinion on the former part; for though the *supplicavit* is not a reason for continuing the separation, yet it is an excuse for her not coming home immediately, till this judicial offer; nor did he make use of the most prudent method; and the letters which appears to have been written by him to her, might have increased her disorder. But if within a month she does not come home, which I cannot decree, let the payment of the arrears be stopped.

(1) See 2 Ves. jun. 195.

(2) In the report in *Atkyns*, Lord *Hardwicke* is stated to say "this case was determined during the usurpation, and whilst the jurisdiction of the ecclesiastical court was suspended."

CORY v. CORY, July 3, 1747.

Agreement, if reasonable and to settle family disputes, and no unfair advantage, not to be set aside because the party was drunk, or paternal authority exercised.

ON a question whether it was sufficient to set aside an agreement, that one of the parties was drunk at the time.

Lord Chancellor thought it was not; unless some unfair advantage was taken, which did not appear in this case: and what he principally laid weight on was, that this was an agreement to settle disputes in a family, and a reasonable agreement. So if a son tenant in tail, and a father tenant for life, agree on something for the benefit of the younger children; and afterward the son complains of paternal authority being exerted; though there might be something of that sort, yet if the agreement be reasonable, the court will not set it aside (3).

(3) See 1 Vern. 48. 2 Vol. 484. 496. Post, 450. 1 Atk. 2. 10. 2 Atk. 592. 1 Ch. Ca. 84. 1 Bro. 349. 1 Ves. & Bea. 30. 31. Et vid. 18 Ves. 12.

BUSH v. DALWAY, July 7, 1747.

(Reg. Lib. 1746. A. fol. 671.)

S. C. 3 Atk. 530 (1).—Covenant by husband to assign a contingent portion of the wife to uses of the marriage. The right of calling for it vests in husband, who dies without doing so: the wife bound by this covenant.

A MAN upon his marriage settles a term of 500 years to raise £6000 if no issue-male, for one daughter; if more, to be equally divided between them payable at twenty-one or marriage, to such as should be living at the death of the father and mother. There was no issue-male, and but three daughters; one of whom (the present defendant) marries, her father then living. But previous thereto, the intended husband by a deed, to which she was party, covenants, that he, his heirs, &c. after the marriage, will grant, assign and set over to trustees named, at their request, all such sums and securities for such, as are now due, owing and belonging to her, and which she shall be entitled to in any respect whatsoever, over and above the sum of £500, due to her by bonds, to the husband for life, then to her for life, then to the children. The father died, then the husband died, without any assignment by him, and without any [20] request by the trustees. She took out administration to him, and claimed this £2000, her share and portion absolutely as a chose in action not called in by the husband, and so surviving to her. The bill was brought by the [executor of the surviving trustee and] her children, who were infants, to have this £2000 placed out for their benefit, subject to her estate for life therein: [insisting that it became due and payable, and ought to have been paid to the plaintiff as such executor of the surviving trustee, upon the death of the defendant's father.]

LORD CHANCELLOR.

It is impossible to say this case is free from doubt; but I think that on the event that has happened, the children have a right. The first question, whether this portion, which at the marriage was contingent, is within the description of this covenant, depends on the words; which are sufficient to include it. The whole must be taken together, and though in the strictness of law it was not within the words *now due*; yet it was belonging to her as a portion on the contingency of her surviving her father; but the following words are very large, and must take it in, which is a sufficient answer to the argument used, that the word *and* coupled the latter words to the former, and hindered their going farther, as it meant to carry the rest farther; but it may be taken disjunctively *or*. Here was a term absolutely vested in trustees (though the trust was contingent) who would have been guilty of a breach with regard to her, if they had acted against it; nothing was to move from him: and it is very extraordinary, that she should take care of £500 and not of this portion, which might have been £6000.

Then supposing it included; the second question is, whether she is bound? and perhaps the event might have happened, in which she would not be bound; as if the right of action never had vested in her husband: but here it did, by his surviving the father. A question was made, whether the husband had a right to assign it in the father's life: which is not

(1) The report here is more accurate than that of Atkyns.

necessary here, although I think he might not. In *Theobald v. D'fay*, before Lord *Macclesfield*, [9 *Mod.* 101. 2 *Wm.* 608. and in the House of Lords 1729. See also 2 *Atk.* 207, 8, and 549.] an assignment by husband and wife, of the wife's executory interest was held good. There the wife had something more than in this case; but that turned on her joining, on which foundation the court determined it for the purchaser, which was affirmed by the lords. Here, before the father's death he had no right of action at all, but afterward he might have called for it immediately, which the wife could have no otherwise prevented, than by a bill for performance of the covenant; according to which it would be settled first for his benefit, then for her's, and then for the children: for the court could not have decreed a partial performance. So likewise the children, or even the husband himself, might have brought a bill to have compelled such a settlement for its security; being to be taken in the light it stood at the father's death; and then the death of the husband will make no alteration: so that the plaintiffs are entitled after her death. The question [21] here depends on that general rule, that what ought to be done is here considered as done; and this ought to have been done in the life of the husband.

GODOLPHIN v. GODOLPHIN, July 20, 1727.

R. L. 1746, fol. 716. entered *Go. v. Geary*.

Devise to *A.* in fee, with directions to settle on descendants of his mother for their several lives, &c. *A.* may limit an inheritance to effectuate the general intent. Execution of a power by a *feme covert*.

DIXIE devised, "To my sister *Mary Dixie*, and her heirs for ever; and "my will is, that the said *Mary Dixie*, whom I make sole executrix, shall "in six months time after my decease, by some writing or good assurance "in the law, settle so much of my estate as shall remain after debts and "legacies paid, on my brother *R.* for life, and on my sister *E.* for such time of "her life, as she shall be a widow, if she survives her husband; and from and "after their decease, on any other person or persons for their several lives, "who are or shall be hereafter at any time descended from my mother, "as my said sister shall think fit; in such manner and proportion, and "subject to such rules and directions as she shall in her discretion order "and appoint, and she may at any time during her life, make void or "change any appointment, and appoint or nominate any other new person, to have and receive such profit and advantage out of my estate, as "she shall think fit; provided it be to the descendants of my mother; because it is my desire, that my estate should continue to persons always "descended from my mother; and for this purpose, I advise, that a writing "may be made to trustees for ninety-nine years, to the uses aforesaid; if "she dies without executing the power, then my brother *R.* within six "months after her decease may do it; and on his dying without executing, "any other relation shall appoint, with the consent of the *Lord Chancellor* "for the time being."

She within six months after his death appoints, with power of revocation; afterward marries and revokes, and limits new uses to trustees to permit *W. Godolphin*, one of the plaintiffs, and a descendant of the moth-

er, to receive the profits for his life, remainder to the first, &c. son, and the heirs-male of such sons, and in the same manner to some other descendants of the mother, with a remainder to the right heirs of the mother.

The bill was to have the benefit and establishment of this settlement; and the general question, whether she had power by the will, to limit an inheritance.

For plaintiff. The general view was, that this estate should go among the descendants of the mother; the manner he leaves to his sister in whom he had great confidence. Had there not been the words *for their several lives*, the general words following would certainly carry an estate-tail; which shall not be hindered from having their effect by the former words: but though the express words did not, the nature of [22] the case would shew, he intended a power of limiting more than an estate for life. This is executory, under a will, and to be executed according to the intention of the testator, for which limitations for life would not be sufficient, as they could not carry it to descendants of the mother not then living. The saying, it shall go to the descendants of the mother, is saying, that it shall go to the heirs of the body; which is as strong as the words in any of the cases cited in *King v. Melling*, [2 Lev. 58. and 1 Ventr. 225;] and the words *are or shall be*, necessarily imply as much as any words in *Humberston v. Humberston*, 1 P. Wms. 332. The intention was not to go to the heir at law as such; but according to the settlement which was intended to be made, so as to take in all: and by the other construction, there might be a descendant from the mother, who could not take: as where two sons by different venters, and one enters, and dies seised.

For defendant, Sir *Woolston Dixie*, heir at law. The former express words exclude an estate-tail: but here are no words giving an inheritance. The view of the testator seems principally, that it should remain as long unalienable as possible; he being indifferent which of the descendants took, or who appointed; and with that intent it is with power of revocation, that she might limit estates for life to the new descendants of the mother, as they came *in esse*; by which means it would continue unaliened for another generation: But her discretionary power is confined to estates for life; her execution therefore is contrary to the direction and intent of the testator, for by her limitation, the issue might alien at twenty-one, during the lives of several descendants of the mother, *in esse*, and in the view of the testator, she could not exclude when *covert*; nor was she empowered to limit to the right heir of the mother; and although the right heir happens to be a descendant of the mother, and in this case must be so; that will not make it good. But if there is any doubt on the intent, as she has not appointed properly, the heir at law, who is also equally within the intention of the testator, should be preferred.

LORD CHANCELLOR.

This is a very dark and intricate will; there are three questions arise on it. The first and principal is, what is the true construction of the will? the second, whether the appointment was made pursuant thereto? and if not, the third is, in what manner the court, which certainly has power to correct it, shall direct as settlement?

As to the first: From the tenor of the will, though not from the words, his intention appears to have been to provide for the younger branches

of his mother's family : and therefore he gives nothing to the elder brother. He had great confidence in, and regard for his sister, and seems to have given her this power of revocation, to keep the rest of the family depending on her ; I do not doubt but he might have intended a succession of freeholds, and the words *who are or shall be, &c.* look that way. The words *manner and proportion* carry it no farther than for life ; nor *such profit as she shall think fit* ; otherwise she would have a greater power under the revocation than under the power itself. But the words on which I lay greater weight, and which I think enlarge the power to give a greater estate than for life, are *I advise that a writing, &c.* His principal intent is, that his estate shall continue to persons descended from his mother. This clue directs us through the will ; and whatever is the best method for executing this intention must be taken, as far as the rules of law will allow.

As to the second question. Two objections are made against the execution of this power, to manner and the substance. As to the first, it is said, that a *feme covert* cannot execute a power ; and that there are no words in the will authorising her so to do. But the words *at any time or times during her life* imply this : and although there were not those words, she might have done it : for it is a power without an interest (1). Nay, there are cases which go farther, yet although there was an interest, such an execution should be good (2) ; but this is improperly called a power ; for being a direction to a person who has the fee, it is rather a trust (3).

As to the substance, the objections are, that she has not confined herself to estates for life ; and has limited to the right heirs of the mother.

I am of opinion, that she had a right to go beyond estates for life ; but whether she had done it in right order, I doubt. In *Humberston v. Humberston*, the words *for life* are annexed to every person that is to take ; and the negative exclusive word *only* in every clause : yet in that case, an inheritance was decreed. So here the intent, that it should always continue in the descendants of the mother, cannot take place without limiting an inheritance. The question therefore is, whether the words *for their several lives*, should controul the general intent. I think not : it is true, this will put it in the power of a common recovery ; but then unless an inheritance be some time or other created, it will be impossible it should go in the line the testator intended. As in *Shaw v. Weight, Eq. Ab.* 185, where it was resolved in *B. R.* to be an estate for life : but by the *Lords*, that it was an estate-tail ; because, though the other construction would preserve it longer, yet it would turn it out of the line. It is said, that here, it will not keep it longer in the line, because the heir at law is a descendant of the mother, and must be so here ; but the testator intended they should all take by the settlement, and although the heir happens to be a descendant, yet he should take *per formam doni*. Besides, this courts considers an estate, over which one has an absolute power, different from that of which a recovery must first be suffered : but according to the construction contended for, the heir would be absolute owner. But the limitation to the right heirs of the mother was wrong, for he gave no power to dispose of the reversion in fee : so that it devolved on the court.

(1) See in *Marquess of Antrim v. Duke of Bucks*, 1 Ch. Ca. 17.

(2) Vide postea, 163, 303, 517.

(3) See *Bull v. Pardy*, 1 Ves. jun. 370.

This brings to the third question; and I am of opinion, that the testator intended estates for life to all the descendants *in esse* at his death; but those I shall not add what are come *in esse* since: then the remainder to the heirs of the body of the testator's mother; remainder or reversion in fee to the right heirs of the testator.

ALLANSON v. CLITHEROW, July 23, 1747.

(Reg. Lib. 1747. A. fol. 711.)

Devise to *A.* for life, with power for trustees to settle a jointure on his wife; and subject thereto in strict settlement on the issue of such marriage: *but if A. should die without any issue of his body, then over.*—The latter words give him an estate tail by implication.

W. ALLANSON devises his real and personal estate, subject to the payment of annuities and legacies to trustees, their heirs, executors, &c. to raise such annual sum for the maintenance of his son, as they &c. so as to afford him a liberal education till he attained twenty-three, and then on this further trust, that when he attained twenty-three they should grant, convey and assign all his real estate to him, his heirs, executors and assigns, subject nevertheless to such settlement as aforementioned: and if he marries a gentlewoman with a good fortune (1), the trustees to settle a rent-charge on her, not exceeding £400 *per ann.* for her life, as a jointure, and in bar of dower and subject thereto, on the issue of that marriage in strict settlement, as counsel shall advise. But if he dies without issue of his body lawfully begotten, he gives additional annuities to the same persons as before, which in some events were to be diminished; and the said real estate to his nephew *C. Comper* for life, then to the trustees to support contingent remainders; then to the first and every other son in tail, they changing their names to *Allanson*; and in default of such issue, to the testator's right heirs for ever. His personal estate to be assigned to his son at twenty-five; but if he died before without issue, then over in a particular manner.

The testator afterward added two codicils; by one of them reciting, that having given his lands to his son for life, remainder over, he gives him power to dispose of any part thereof; but the money thereby raised, to be paid to the trustees to lay it out in a purchase, and settle it in the same manner, [&c. and with such alterations he confirmed his will. He also confirmed it by the two codicils, except in the points there specified.]

The bill was brought by the son to have an execution of the trust according to the will and codicil; he having attained the [25] age of twenty-five unmarried; and insisted, that he thereby was become intitled to the possession of both the real and personal estate.

LORD CHANCELLOR.

This cause arises upon a will, of which it is difficult to make a consistent construction. The estate was oddly situated in respect of its increasing or diminishing in point of value. Two points were insisted on for the plaintiff: but having gone upon the first, they have not fully considered the latter, where lies the greatest doubt. The first is, that the

(1) The word was not "good" but "suitable;" which the court declared to mean a portion "bearing a reasonable proportion to a jointure of £400 a year rent-charge." R. L.

strict settlement directed to be made upon the son's marriage, with the remainder over to *Cowper, &c.* are all only contingent limitations, viz. If the son married before twenty-three, then to take effect; but if he attained that age unmarried, the fee to be conveyed to him. The second is, that supposing this against him; yet he is intitled by the subsequent words, introductory of the devise to *Cowper*, to have an intermediate remainder in tail general, after the particular limitations precedent to *Cowper's* estate. The defendant insists that the estate in all events is subject to the strict settlement; and that the plaintiff is only to be tenant for life, with remainder to his sons, remainder over.

The first point is clearly against the plaintiff; notwithstanding his attaining twenty-three unmarried, all the subsequent limitations are to take place within the intention of the testator; whose meaning could not be to make them depend on that contingency, with which they have no connection, and which must be confined to the increase of the annuities only, viz. that his son should not be so charged; but that a more remote relation should, if it came to his hands. The disposition of the personal estate cannot effect the construction of the real estate: if it had stopped at the first clause, it would certainly have given a fee; but the subsequent words, *subject to such settlement, &c.* restrain it. The word *heirs* in a will is always understood, such heirs as the testator meant, and he has shewn here afterward that he meant heirs of his son's body, under some description or other, and not heirs general, so as to give him a fee: and this construction is frequent even in legal limitations: but the codicil puts it out of doubt; where he says expressly, he had given to his son for life, and then in strict settlement: and it plainly shews, that he did not intend it should depend on this contingency; for the codicil was made but a few months before his attaining twenty-three, and if the testator had intended him a fee, what occasion was there for the great care and provision for the money arising from the sale, when probably the settlement would never take place? it being so short a time between that and the [26] son's attaining twenty-three, at which time he would have the absolute disposal.

As to the second point; I am of opinion, upon great consideration, that there must be such an immediate remainder in tail, after the strict settlement; for it would not be otherwise be preserved in the channel intended by the testator: and to this it shall be taken for granted, that by the former point, he is tenant for life expressly: and then the question is, whether the subsequent words *if he die without issue*, are sufficient to enlarge or give an estate-tail by implication. There are two cases to be considered (c): the general rule is, that an express estate for life is not to be enlarged by implication; for which *Bamfield v. Popham*, 1 P. Wms. 54, is a great authority. But what was there relied on was the testator's provision for all the issue-male of *Popham*, (for it is wrong stated in *Salk.* where it is only to the tenth son) so that it could be of no use there, to construe it an estate-tail, since it would be preserved in the intended channel, without that construction (1), which I mention to introduce the case of *Langley v. Baldwin*: which was a devise for life; remainder to the

(c) 1 Wms. 54. 2 Vern. 427, 449, unless the manifest intention of the testator appears. 1 Burr. 44. 3 Burr. 1570. 3 Salk. 734.

(1) Vide S. P. in *Attorney-General v. Sutton*, 1 P. W. 760.

first, and so to the sixth son only; and if he died without issue-male, then over. Lord *Cowper* sent it to the court of *Common Pleas*, and the opinion of the judges was, that the subsequent words, *if he die without issue*, should carry an estate-tail, in order to let in any subsequent sons, who otherwise could not take; but it would go over to a remote relation. So that the ground of the difference between this and the other case is plain; and in the present case, the issue on the marriage only is provided for; so that if the first wife dies, any issue by an after-taken wife would be excluded, contrary to the intent of the testator; unless some benefit arises to them under the last clause, and there is the same inconvenience as in *Langley v. Baldwin*; which is wrong reported in *Equity Ab.* 185, in the very point. It was objected for the defendant, that this inconvenience will not happen here; for that the trustees might execute this power *toties quoties*, and that *gentlewomen* is *nomen collectivum*. But that cannot be according to the construction of powers, which can be executed but once, unless the words import otherwise, as it evidently is not here; although it might be executed on a second wife, if not done before, and this decree answers all the words in the will. It is objected, that this will give the son a power to suffer a recovery, and bar the limitation to *Cowper*. But there is no help for that; for if the will is so framed, as that the court cannot restrain such common recovery, (which is a consequence of law) without contradicting the testator's intention in the channel of descent, the law must take its course. Let the settlement therefore be made accordingly.

N. B. Lord Chancellor observed, that Lord *Trevor*, 1 P. Wms. 56, began his argument in *Bamfield v. Popham* with saying, that it was resolved, that *cestuy que trust*, with remainder to the first and [27] every other son, &c. could not destroy the contingent remainder, in *Penhay v. Hurrell*, 2 Vern. 370. although that point is not there taken notice of, because it is only a report of the argument: and that this shewed it was not entirely a new point, or first determined by Lord *Talbot* in *Chapman v. Blisset*, and afterward by him in the case on Mr. *Hopkins's* will, as was apprehended at the bar.

BEAUMONT v. THORPE, July 25, 1747.

(Reg. Lib. 1746. A. fol. 598.)

Settlement after marriage voluntary and void against creditors.
Parol demurs only where the estate descends.

UPON the marriage of the defendant with her late husband, he and his father promised to settle an estate on her in consideration of the marriage and £1000 portion; but she refusing to let the father have the portion, he said she should have none of his lands, and would not settle them upon her, but conveyed them to his son in fee. The son, seven years afterwards being indebted, settled the estate upon her for a jointure, and then in strict settlement, and died. His creditor brought this bill against his widow, and infant son, for satisfaction of the plaintiff's debt.

It was argued, that this was not a voluntary settlement by the husband, but for valuable consideration, being an execution of the father's promise

before and to be presumed; therefore that it was done in consideration of marriage. His promise was to settle a jointure on her marriage, which must mean in strict settlement; it was a reasonable settlement, and the children are purchasers under it; nor is it fraudulent within the statutes of *Elizabeth* (1); and the plaintiff who is only a specialty creditor at large, not proceeding on this particular estate, is not to be favoured, as a purchaser is; but supposing it both voluntary and fraudulent, this being the case of an infant, the *parol* should demur.

LORD CHANCELLOR.

There is no colour to say, this is not a settlement for valuable consideration; for it is in consideration of a marriage already had without recital of any articles before the marriage: so that on the face of it it is voluntary: but then it is said, I am to presume it was done in performance of the father's conveyance to the son seven years before, which imported a consideration. This I could not do, if it stood by itself; but it is contradicted by the evidence, and the father put it in the son's power to do what he pleases with it; and it were an odd presumption, that the father performed his promise by his settlement, and that the son performed it again. If then I do not say it is void and fraudulent in respect of bond creditors, it will be contrary to the statute of *Elizabeth*: but there is a distinction taken between purchasers on the credit of the estate, and creditors who had not the estate particularly in view, and there are cases of that kind: but latter cases do not go on that distinction, so that though it be hard, it is void against the plaintiff (2).

Then the *Parol* never demurs but where the estate comes to the heir by descent: so on the statute of fraudulent devises; which does not create a descent by the operation of it, but only says, it shall be void against creditors.

(1) As to the difference between the 13 *Elis.* c. 3, which is in favour of *creditors*, and the 27 *Elis.* c. 4, which is in favour of *purchasers*, see the principle deduced in 1 *Atk.* 15, and Mr. Sanders' note, *ibid.* 93. 5 *Ves.* 384. 12 *Ves.* 136. 148. 155 and 156, note.

(2) "And all judgment and specialty creditors." R. L.

BAKER v. HART, July 31, 1747.

(Reg. Lib. 1746. A. fol. 706.)

S. C. 3 *Atk.* 542.—Legitimacy issue.—New Trial.

ADMIRAL *Hosier* dying in 1727, a marriage was alleged to have been had with him; the issue of which marriage was a daughter; who married *Hart*, by whom she had the defendant. There were various litigations after the admiral's death about his real and personal estate: and as soon as possible an ejectment was brought on the demise of *Hart* and his wife, claiming as his daughter, and a verdict was found for the lessors of the plaintiff, which affirmed her legitimacy. Then there was a long dispute in the ecclesiastical court concerning the personal estate, between the supposed widow only, and the next of kin, to whom administration should be granted: which depended on the question, whether she was ever married to him; and it was determined there, that she was not: which was finally affirmed upon appeal to the *Delegates*, and administration granted contra-

ry to her claim. Upon application for a commission of *review* (2) it was refused here on great evidence, and on those two concurrent sentences; then the plaintiff brought a bill here against the widow and her daughter: controverting the real estate, and to have an injunction, and account and final determination: which was heard *May* 1746, when two issues were directed. First, whether the mother of the defendant was daughter and heir of Admiral *Hosier*? The second, whether *William Baker*, late father of the plaintiff was his heir? It was directed to be tried at the bar of the *Common Pleas*; but at desire of the plaintiff was tried at *Nisi Prius*. There was a verdict for (3) the defendant; and it now came upon the equity reserved, and an application for a new trial.

LORD CHANCELLOR.

I own, I have had some doubt of what was proper for the court to do; for though I apprehended the last verdict not to be according to the truth and justice of the case; yet there are objections against a new trial, which have some weight. It was said to be a general rule, not to grant a new trial, after a trial at bar; and that it is to be considered here in that light, as it was altered at plaintiff's desire. But there is no certain rule for that; and in the first case of this kind, in *Stiles* 462, a new trial was granted, after a trial at bar; the application here is not to set aside the former verdict; and in doubtful questions relating to inheritances, a court of equity frequently grants a new trial without setting aside the former verdict, which is of great consequence to the parties; for then it may be given in evidence, though not conclusive; either party being at liberty to shew on what grounds it was obtained; but courts of law in that case always set the former aside. It was said, that this was a matter of inheritance, and therefore proper to be tried again. As to that, it never has prevailed as a general rule, but according to the circumstances of the case; if there is any doubt of the facts, the court has often done it, as in *Edwin v. Thomas*, 2 *Vern.* 75. *Leighton v. Leighton*, 1 *P. Wms.* 671. where several trials were granted, because the inheritance was to be bound, as it is alleged for the plaintiff it would be here, he having no opportunity to try it again in ejectment. The contrary is urged for the defendant. I do not see which way this argument will conclude: if a new ejectment may be brought, where is the prejudice to the defendant to grant a new trial, for the plaintiff will only have costs here? And according to the case of *Sherwin v. Lord Bath*, *Prec. in Chan.* 261. it will be still liable to an ejectment, which takes off this objection against a new trial; since it will not quiet the defendant's possession. But it is said for the plaintiff, that he would be absolutely bound; because the court must give some directions as to the application of the rents and profits come to the receiver's hands, who was appointed by the court to account with the defendant; and that therefore if a new ejectment should be brought, the defendant might bring a bill for a perpetual injunction, which would be granted. But the cases cited for this are not entirely ap-

(2) As to the nature of such commissions of review, see *Matthews v. Warner*, 4 *Ves.* 186. 5 *Ves.* 23. and *Ex parte Fearon*, *ibid.* 633.

(3) Notwithstanding what Lord *Hardwicke* is reported to state, post, p. 30, it appears from R. L. that the jury not only found the first issue in the affirmative, but negated the title of the plaintiff's father in the second. And see also accordingly the report in 3 *Atk.* 542, where Lord *Hardwicke's* observation is explained.

plicable, as in the case of *Vernon v. Acherly* (1), where the court granted an injunction, because otherwise the execution of the trusts decreed would be overturned, and there would be no end of things. In the case of *Attorney General v. Montgomery* (2), Nov. 25, 1742, an injunction was also granted on the foundation of the decree for execution of the trust. So in another case of *Sir Thomas Colby's* will, where the court had decreed a partition and conveyance of an estate, so that an ejectment brought tended equally to overturn the decree of the court, as in other cases; to these the present case bears some analogy; but does not go quite so far; for the appointing a receiver was only interlocutory, and not a judgment upon the merits, in which the court had proper and final jurisdiction. This consequence indeed it would have; that if the plaintiff recovered on a new ejectment brought, he might have an action for those very mesne profits, which the court had before distributed; but this is a middle case between both, and never yet determined. The objection therefore on both sides, as to the bringing a new ejectment, is of no weight here; the objection against a new trial, that this is a question of legitimacy, and ought to be favoured, is of small weight; for that is true, where the legitimacy claimed is on a cohabitation, which was the case of *Stapleton v. Stapleton*, [30] 1 Atk. 2.] Aug. 3, 1739, where the only question was on the time of marriage, whether before or after the birth of the eldest son; which therefore stood in a favourable light; but the question here is different, and not to be favoured; the legitimacy of this daughter being first raised and set up after the father's death, at which time she must be seventeen years old, and no pretence of cohabitation in his life; but all the facts speak the contrary, both to that and the marriage, which is attended with strong circumstances of suspicion; such as the licence being taken out by the woman, and Admiral *Hosier's* being described by a wrong addition of mariner; then it is insisted, that there have been two concurrent verdicts for the defendant; two issues were directed in order to try the whole right; for though the first would be sufficient, if found for the defendant, yet not if found for the plaintiff, who must prove himself heir, as he must recover upon his own title. The verdict was for the defendant on the first issue, and to the satisfaction of the judge, who informed me, that the jury did not enter into the second point; so that it cannot be taken to be a determination against the plaintiff, on the second issue (3). It is certain that the former verdict was given in evidence on the latter trial, and had great weight with the jury. If therefore there is any thing to impeach the former verdict, it takes off the objection of two concurrent verdicts; and it does now plainly appear before me, [*Mosely* 321.] that there has been mal-practice, which could not appear nor be given in evidence, in the manner it was offered upon the trial. It was further objected by the defendant, that there has been great delay, and that several of his witnesses in the first trial are dead; which is certainly unfortunate, and must have had some weight, and occasioned his evidence to be looked on favourably in the second trial, and will do so again. But witnesses are

(1) See this cause fully, 4 Bro. P. C. 85. octavo ed.

(2) 2 Atk. 378. As to granting new trials after trials at bar, &c. &c. see 1 P. W. 207. 212, and 2 Atk. 320. and see *Stace v. Mabbot*, post, 2 vol. 552.

(3) The reporter is mistaken here. Vide ante, p. 22, note 3. (3) Atk. 543.

mortal ; and from the circumstances it does not appear to have been unnatural to wait for the determination of the court. One would, if possible, reduce to a consistency the different determinations of the courts ; which is an inconvenience arising from the constitution, and to be lamented when it happens : as it did in the case of *Maxwell v. Montague* (1). So that it is proper, that the parties should have an opportunity of laying the whole before the court by a new trial, and that at the bar of *B. R.* but as the defendant is an infant, and in mean circumstances, the plaintiff must be content with *Nisi Prius* costs, if found for him.

(1) 11 Vin. Ab. 65. tit. Executors, pl. 9. Vide also 2 Atk. 388.

EARL of PORTSMOUTH v. LADY SUFFOLK and LORD
EFFINGHAM, Aug. 1, 1747.

(Reg. Lib. 1746. A. fol. 634.)

Parties entitled to an estate, confirming a jointress's settlement, are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement.

THE plaintiffs claimed the estate in question, under a reversion in fee descended to them as coheiresses to Lord *Suffolk*, by virtue of a settlement made by him in 1687, which limited the reversion [31] to his right heirs. Lord *Effingham* claiming under another settlement and recoveries suffered ; and the deed in 1687, being in the hands of Lady *Suffolk*, who refused to deliver it up, unless her rights were confirmed, the plaintiffs were obliged to bring a bill for discovery. Lady *Suffolk* insisted, that on her marriage and bringing £25,000 portion it was applied to the paying off incumbrances ; which when paid, were assigned to her ; and a jointure made of £1600 *per ann.* and that her husband also covenanted by lease, will, or otherwise, if she survived, to leave her a house worth £3000 for life ; if not, that his heirs, executors, &c. should pay her the interest of £3000 for life ; and then there was a term of 100 years in trust, that upon his not settling such house according to the covenant, the trustees should, by and out of the rents and profits of the lands comprised in that term, pay her £150 *per ann.* for life in satisfaction of the covenant. The plaintiffs offered and were decreed to confirm all this ; and after a trial in ejectment and verdict finding that the recoveries were bad, and had not barred the reversion in fee, the plaintiffs now insisted on an assignment from her of all the mortgages, &c. paid off by her portion, as standing in her place, who could have no other right to them than as securities ; the benefit of which the plaintiffs claimed for the loss they suffered in confirming her jointure, which depending on the same recoveries, would not have been good if she had not had that deed in her custody : and also that this annuity of £150 was a personal demand, and to come out of the personal estate, for which the real was only a security, if that was deficient ; the term coming in aid of the covenant, and only a collateral security for her principal demand, the house ; and therefore if she came on them, they might by circuitry come on the personal estate, which she possessed as executrix.

For her it was insisted, that Lord *Suffolk* not having left her the house,

she had her option to take that which was most beneficial for her, either the house, or the £150 *per ann.* as an incumbrance on this estate. The interest of the £3000 was an additional jointure issuing out of lands, and to be considered as real estate, and the personal estate was not the fund originally to make it good, but should go to those intitled thereto.

LORD CHANCELLOR.

It is plain, that she cannot so make her election as to change the nature of the charge, and turn it on which fund she pleases; whether it was a stranger or no, that was intitled to the personal estate. The question is, what was the contract between them on their marriage? it plainly rested upon the covenant, the term was a further security; not a new provision for her. If this settlement had been good of his own estate, of which he might dispose, and there had been a son, the equity would have been this; that son might have said, this was a covenant, which being broke [32] by his father, must be satisfied out of his personal estate; and it is stronger for the plaintiffs; for it is a settlement of an estate, which he had no right to settle; and as the plaintiffs must confirm all her rights, they are purchasers of all her interest, and are intitled to every thing securing her right. So the equity is stronger for them, than between a son or heir at law and the representative of the personal estate. The incumbrances are not paid off for those who were not intitled under the settlement: but they are purchasers by letting her have her jointure out of their estate. There is no colour therefore to say, the representatives of the personal estate should be preferred to the plaintiffs, who must be indemnified against the £150 *per ann.* out of the personal estate; and the securities be assigned for the plaintiffs.

ATTORNEY-GENERAL v. LLOYD, *Aug. 1, 1747.*

(Reg. Lib. 1746. A. fol. 689.)

S. C. 3 Atk. 551.—Question as to the revocation of a will *merely on the words, sent to law*(d).

Will made before the mortmain(1) act good, although the testator died after it(2).

JOHN MILLINGTON, seised of a considerable real and personal estate, made a will in 1734, and gave his real and personal estate to be laid out in purchase of real estate to his executors and other trustees and their heirs, to apply the rents and profits to payment of some legacies; then to reimburse themselves, and then to a charity. He afterwards made a codicil in 1736, taking notice that he had given his real and personal estate to certain uses; and that being doubtful, whether by the late mortmain act his devise of his real estate to the charity or part thereof would be good, and being desirous to confirm it in that case, and not otherwise, he gives so much of his real and personal estate, as could not pass by his will, to the use of his nephew *Millington Buckley* at the age of twenty-one, with limitations over, on his dying without issue, with proper maintenance

(d) Post. 186. 190.

(1) 9 Geo. 2 ch. 36.

(2) Vide post, 178. 186. 225. Ambl. 451. and 550.

till that age. He afterward makes another codicil, reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make further provision for better support thereof, he gave his personal estate to his executors upon trust, that if it cannot be laid out in land, it may in securities for the same charity: and his real estate he gives unto and for the use of *Millington Buckley*, at twenty-one; and declares, that it is his opinion, that his estate at *L.* is sufficient to maintain him during his minority. Upon an information to have the will and codicils so established, as that the charity might be carried into execution: it was decreed at the *Rolls*, that the will was well proved, and that the trusts should be performed, and that a scheme should be proposed for carrying the charity into execution: from which decree the defendant *Millington Buckley* brought the present appeal.

For the relators. The testator dying after the late *Mortmain* [33] act made in 1736, the first question, whether the devise of the real estate to the charity by his will made before that act is good, cannot now be disputed; for it was determined before the twelve judges in *Ashburnham v. Kirkhal*(1), while the present suit was depending at the *Rolls*, that the devise in such case was good. The second question is, whether the devise is revoked by the codicil; which was the point determined at the *Rolls*, as it was decreed, that the trust of the will should be performed. The first codicil has expressed only the testator's doubt; and he has there given nothing, but in case the real estate was not well devised, and in that case only; and therefore, as the law will permit it, the devise will be good. In the second codicil the testator does not, as in the former, give upon a contingency of the law's not suffering it; but on a supposition that he could not do it: and so on a mistake in law; under which if he had not been, he would have given it otherwise. Where one proceeding on a mistake revokes thereon, it is a contingent revocation. It is the same as if he had said, "because I am advised, that the devise is void:" and that error is the foundation of the gift to the defendant, a condition annexed thereto, and to the revocation, on which only this gift can operate; and the consequence is, that this prevents a revocation: like the case of *Onions v. Tyrer*, 1 P. Wms. 343. 2 Vern. 741. Prec. Chanc. 459. In the case of *Clifton v. Lady Lombe*, Amb. 519. the testator, in consideration that his wife promised to continue his widow and to leave to the children at her death, devises to her: the testator there was under a mistake, there being no such promise by her; for she denied it, and there was no proof of it: yet the court thought, that because he had thus taken notice of such promise by her, it should be the condition of the gift. So whatever appears to be the cause of the gift, if there is a mistake in that cause, it is naturally annexed to it. So in 2 Chan. Ca. 16. *Winkfield v. Comb*, suppose the testator had devised to *A.* who was his wife; and it appears that she had married before: it could not be good (2). Suppose a devise to *A.* and afterward a codicil reciting the will, and that the testator was advised *A.* was dead, and gives it to *B.* If *A.* was alive, *B.* will have nothing: the construction of the personal estate may serve for the real: and *Swinburn*,

(1) 2 Atk. 36. and Barn. Ch. Rep. 6.

(2) This position seems wrong; and the Editor was concerned in a case in which the point was conceded contra *Gilbert v. Gilbert*, Lincoln's Inn Hall, 1815.

under the general head of what is revocation of a will, mentions *error*, and put this case; that because my son is dead, *B.* shall be executor: if that fact is false, *B.* shall not be executor. So that from the general intent and expression of the testator, there is no revocation.

For defendant. The last testamentary act must operate strongly. Whatever was the testator's motive, he meant an absolute not a conditional act. The first codicil is made after the act of parliament creating his doubt; he there makes a disposition with a view to his doubt; the doubt as to the real and personal estate is the same; it being [34] to be laid out in lands, and therefore he disposed of both, if the devise was not good: but afterward finding he could make as great a provision for the charity by his personal estate, he does not leave it to the conditional disposition as on the first codicil, but decides it himself, and not in the way of the first codicil; for then he would have used the same words. As to the personal, he has left it open to the question: not so of the real estate, which he would not have torn from his nephew. He has left sufficient personal estate to the charity; and cannot be said to mean to leave his real estate to it. Then he has given directions, which by a side wind would increase the charity, by easing the personal estate in part, applying part of the real for maintenance till twenty-one; and if he had intended more, why did he not ease it entirely? It is impossible to say what he would do; but he thought there was enough for the charity by easing the personal estate in part; it must be admitted, that in express words there is an absolute devise; but it is said his motives must be considered. There is a difference between the motives to do a thing absolutely, and on condition; for in the last case it will depend upon the condition, but in the other cannot be inquired into. Suppose, on the knowledge of this doubt, they came to an agreement; the court could not set it aside: his motives were reasonable; and the court cannot say, your absolute devise shall be conditional. The cases cited are different: in all of them the testator was mistaken: which it is begging the question to say here. In *Lady Lombe's* case it was an imperative bequest. In *Onions v. Tyrer*, the whole went on the evidence, of what amounted to cancelling. The court is not to strain in favour of revoked wills against an heir at law; and if the court can go into it, on showing what were the motives, there is no knowing where it will end.

LORD CHANCELLOR.

I am very doubtful about this case: and would put it in a proper way of being determined. This is very different from all the cases cited: the question of revocation does not turn upon collateral circumstances, but merely on the words in the instruments themselves; which make it differ from *Onions v. Tyrer*; indeed Lord Comper there says, it might be relieved on the head of accident: but I do not know how he could come at it in a question between devisee and heir at law. It is proper therefore for a court of law; and the same construction must be made as there. The first reason why I doubt, is, that if the testator had intended, as the relators contend, that this was a revocation, and a new devise only in case the will was not good, he would have left it on the first codicil: and no occasion for making a new one; for it would be just the same with respect to the charity as on the first. Another reason, which makes me

doubt, is, that it is very nice to say, that because the reason a person gives fails, therefore his devise should fail. I do not know how far that will extend; the testator has put it on the advice he [35] received, which was a fact of his own knowledge; and he has grounded it on that advice, and not on the reality of the law: he might do it in order to quiet the doubtful question; but I do not say he did so. The third and principal reason is, I doubt whether this disposition is put singly on the point of law: for considering the material words *being advised*, and the subsequent words, who can tell what he meant there? the codicil was made two years after, and his personal estate might be so increased, as to be a sufficient fund for the charity; for all this together might be his reason, and it is impossible to say he depended on one more than another. I give no opinion, for it is a mere point of law, and a new case; and will send it into *B. R.* to be there solemnly argued, and reserve further consideration till after the judge's certificate (1).

(1) The question was, "Whether the testator's real estate in *S. and S.* were well devised by the second codicil, dated the 17th of *March*, 1736, to the defendant *M. B.* for life, "with remainder over to his first and other sons in tail-male, the said *M. B.* having attained his age of 21 years," &c. The court certified in the affirmative, whereupon Lord *Hardwicke* declared and decreed accordingly.

TOWNSEND v. LOWFIELD, July 20, 1747.

(Reg. Lib. B.1746. fol. 461.)

S. C. 3 Atk. 536.—Account—Liberty to surcharge and falsify.

Admission of a debt obtained by fraud or force, not set aside on motion, but may be a ground for a new bill, although the former still depending.

On positive proof of fraud, court will often direct the master not to allow any sum as paid which is not specifically proved.

WILLIAM HALL, an extravagant young man, got *Lowfield* to raise him money on promissory notes of *Hall*, indorsed by *Lowfield*, who also got notes and bonds from *Hall* for a very large sum. *Hall* was afterwards sued by some creditors, and discharged out of prison by the insolvent act and his effects assigned over. *Lowfield* (who had been three times bankrupt, and the last time without any dividend made of the effects, and not two years before his dealing with *Hall*) being a principal creditor, brings a bill against *Hall*, the assignees, and persons in whose hands the estate was; and a general account was decreed to be taken of what was due. On going before the master, several objections arose; and the other creditors of *Hall*, having got more influence over him, procure him to make an affidavit that *Lowfield* had obtained an acknowledgment and admission of his debts from him, without any consideration: and application was made to the court; that *Lowfield* might not be allowed to produce a paper to that purpose, as being under the hand of debtor to creditor; the master could not set aside; but *Lowfield* consented to lay that paper out of the case. The master being directed to take an account pursuant to the former decree, and to enquire what was really and *bona fide* due; *Lowfield* produced two other papers of the same import, though not the same date with that given up. The master allowed them: and on his report, it came before the court; which to give further light to this affair, gave liberty to the representatives of *Hall*, who

died since the decree, to bring the present bill to be relieved against this demand of *Lowfield*, and to inquire into the legality of these papers.

For plaintiffs. It was insisted, that although it was proved, that part of the money raised on the bonds and notes was paid to *Hall*; these notes and bonds should not be allowed as an evidence in the ac-
[36] count to be taken, and *Lowfield* should not be allowed any thing, of which he could not prove actual payment: that from the whole complexion of the case there appeared fraud and imposition; and it was better he should lose something of what he had advanced, then be paid of all those fictitious demands.

For defendant. The evidence admitted by the master should be conclusive; it is hardly possible to prove the actual payment of money, which is seldom done in *specie*. In *Johnson v. Johnson* in the *Dutchy court*, there was a bill for foreclosure of a mortgage: the defendant insisted the money was not paid: the plaintiff proved part, but could not prove all the considerations: and inquiry was decreed by Lord *Lechmere*, of what was actually paid: but that decree was reversed in the House of *Lords*, because part being proved, though not the whole, and no fraud being proved, the *onus probandi* should not lie on the mortgagee; fraud being not to be presumed. It is dangerous to judge by the complexion of a case; and better even that the defendant should be an unjust gainer, than the rules of evidence be infringed.

LORD CHANCELLOR.

Though it is truly said, that the general complexion of a case is not sufficient to overturn the rules of evidence; yet it is a reason for sifting into the circumstances as far as is consistent with the rules of the court: and here it appears very extraordinary, considering the objects on both sides, that a man should have his extravagance fed by such a person, in the circumstances the defendant appears to have been in. But as that is possible, it is not sufficient to determine the judgment of the court, as to the relief sought, and to set aside all the securities; but that will depend on the weight of the particular evidence; and this objection is weakened by the proof made of the payment of part to *Hall*. This come on in an unusual manner; not a bill of review, but in aid of an account directed generally by a former decree, to see what was due; with which, what the court now does must be consistent. It would have been difficult for the court to set aside that first paper; for where a creditor or a plaintiff obtains by fraud or force, an instrument amounting to an admission of the debt, the court cannot set it aside on motion, but it shall be a ground for a new bill, though the former suit be depending: the order then made to the master prevented the bonds and notes from being conclusive evidence. It appeared very extraordinary, that on the defendants giving up that paper, two others of the same effect should be produced, which would hinder the court from coming at the justice of the case; and therefore liberty was given to bring a bill for relief, with a view chiefly to shew fraud or imposition in obtaining those papers, that they might be set out of the case. And now upon the merits there appear great circumstances of suspicion, which yet is not sufficient to found a decree upon.
[37] There is no proof of actual imposition upon *Hall* who was very extravagant, and liable to be imposed on in getting money;

but that is such a weakness as proceeds from want of understanding ; and therefore such a person might put himself into such a condition, as that the court cannot relieve him. As to the improbability that the defendant being in such circumstances, should furnish him with money ; that had some weight, and induced the court to look into the the real fact, although generally a person's circumstances, (as they may be) private, are not to be so inspected ; but the defendant has made stronger proof than I expected, of his giving him money ; which is not to be got over, whether done on his own sole credit, or by the connection with *Hall*. 'Then as to the two papers ; I cannot say that, when a person has consented to lay one piece of evidence aside, he should be prevented from making use of another, if fairly obtained. I cannot set them aside, or direct the master to allow of no sum, which is not proved to be actually paid : the court sometimes indeed does that ; but not wantonly on presumption or inference. It was done in the case of *Sir Oliver Ashcomb v. Greenaway*, on full positive proof of fraud : but should such direction be given here, the defendant would lose many considerable sums actually advanced to *Hall* : for several of the witnesses are dead, as is *Hall* himself ; who, if living, might be examined on interrogatories. And in the case of *Johnson* it was a material ingredient in the reversal of the *Lords*, that the party was dead. By way of addition therefore to my former order, let plaintiffs be at liberty to falsify these two papers ; and if they can shew, that some of those notes, &c. were for the debts of the defendant, or for interest wrong computed, or so, they shall have allowance before the master, which will prevent the conclusiveness of the notes, &c. If a man will create evidence against himself by admission, it is better that he should suffer, than the rules of the court be overturned.

STROUD v. DEACON, Aug. 10, 1747.

(Reg. Lib. 1746. B. fol. 449.)

Demurrer to discovery of defendant's title under a settlement, in contradiction to which plaintiff claimed, over-ruled, being unsupported either by answer or plea to a specific charge on the bill.

THE bill was to have a discovery of the defendant's title by setting forth a settlement by which he claimed, that his wife upon her marriage settled the premises to her separate use, and that he is her representative ; the plaintiff alleging, that if that settlement was produced, it would appear, that she was only tenant for life.

To this discovery the defendant demurred ; because the plaintiff does not claim under that settlement.

LORD CHANCELLOR.

[38]

As the plaintiff has made a title in contradiction to yours, he hath no right, generally speaking, to look into your titles ; but the bill charging that by producing this deed it will appear that her title was only for life, you must give some answer to it, and not barely demur, and what you barely know or believe is not sufficient, but what it is by this settlement. You have not pleaded your self a purchaser so as to cover that ; but have demurred to the whole, and it must be over-ruled.

SHEPPARD v. COTTON, *Aug. 10. 1747.*

(Reg. Lib. 1746. B. fol. 495.)

Demurrer allowed to a bill for payment of wages of knights of a shire; the remedy being at common law.

By an act 34 *H. 8.* the estate of Sergeant *Hind* was charged with the payment of £10 *per ann.* wages for those who served as knights of the shire for *Cambridge*: and for that purpose gave a corporation, consisting only of the two knights and the sheriff, a right to enter and distrain. The plaintiff charges, that he has served since the year 1724; that he applied for payment of it to the defendant, who refused; and the other members refused to join in the recovery of it: so that his only relief was in a court of equity. To which the defendant demurred.

For the demurrer. This is a mere legal right, if any. The plaintiff says, he is disabled from suing at law by the refusal of the other members to join: but the corporation is one body; and the plaintiff as one member might bring an action at law in the name of the corporation; and then the defendant, supposing he had a right at law, could not have prevented his going on. But suppose he could not sue at law, yet he should not bring a bill against the defendant, but against the corporation for not joining: and then, if he had a right, the court would give him a remedy, by directing the other members to permit him to sue in their name. To consider it on the merits: this, like other statutes, may be barred by the statute of limitations. The plaintiff has not charged that it was ever paid; and desuetude is a discharge thereof.

Against the demurrer. The only remedy is in equity: where one cannot sue alone, it is a foundation to come here. The corporation acts by the majority; therefore one alone cannot carry any of the powers into execution. The statute of limitations should be pleaded, and is therefore out of the case: the corporation are only trustees for the knights; and where by combination some members or trustees refuse, it is a collusion proper for a court of equity to decree upon, and every demurrer admits the facts charged. If it was a matter of public right, there would be some foundation for courts of law to interpose and grant a *mandamus*: but this concerns not public justice, but private property.

[39] LORD CHANCELLOR.

This demurrer must be allowed, though not on the point of desuetude; for our laws do not admit that. The last member receiving such wages was *Andrew Marvel*, in the time of *C. 2.* If a bill was brought here to recover such wages against the inhabitants or electors in a borough, I would dismiss it, and leave the plaintiff to law. The question is singly, whether the plaintiff has remedy against the defendant; for the demurrer puts the bill out of court as to that defendant only, still remaining as the rest? Suppose the court should order, that the plaintiff might proceed against the defendant to recover the wages, and the cause should go on to a hearing: it must be dismissed against the defendant with costs; for otherwise he would be doubly vexed. Though a demurrer does generally admit every thing charged in the bill, yet it is not so here; this is a demurrer attended with an answer and denial of com-

bination; so that no decree can be against the defendant; and I doubt, whether it can against the corporation. It so far concerns the public, as it concerns this county, and such powers are proper to be executed by *mandamus* out of the *King's Bench*; which has authority to compel the execution thereof if still in force: but that concerns the relief against the other members. Here is a clear remedy given at law, and the members of the corporation are to take that remedy; and the defendant is only subject, as the act has charged, by distress, &c. and I will not change the remedy; for a bill to compel such a payment was never heard of. Whether he is intitled to make use of the trustees names is another matter.

RICHARD v. EVANS, &c. 2. con. Oct. 26, [and Nov. 27th,] 1747.

(Reg. Lib. 1747. B. fol. 151.)

Not necessary to use the word *modus* in laying it. Nor a particular day of payment. A *modus* may be overturned for rankness, if for a specific thing: if otherwise, will be sent to trial (1).

THE plaintiff as rector brings a bill for payment of tithes in kind: the defendant as owner of the farm, brings a cross bill for establishing a customary payment of £7 *per ann.* in lieu and satisfaction thereof.

For plaintiff. This *modus* is neither well laid nor proved, nor is the day of payment certainly specified; for want of which a *modus* was held not good in point of law in the *Exchequer*, *Trinity Term*. 5 G. 1 (e) because the time of payment of a *modus* ought to be as certain as of the tithes, in place of which it is substituted; which as to the fruits of the earth is immediately on the first severance; and a custom uncertain is no custom. Then the payment of such a gross sum is an evidence against the *modus*, as too rank: for as every *modus* must be presumed to commence before the time of memory, this many years ago must have been very near the value of the farm: it is therefore rather a modern composition, or rent for tithes.

LORD CHANCELLOR.

The objections to the laying the *modus* are of no weight; for neither in law or equity is there any necessity to use the word *modus*, as appears from all the cases on this head, as in *Cowper v. Andrews*, *Hob.* 39. *Shelton v. Montague*, *Hob.* 118. and 1 *Ven.* 3. it being only a technical term not used in pleadings; in stating of which Lord *Hobart* was very accurate. The material words are *so much money* paid in lieu and satisfaction of tithes. As to the general question, whether it is necessary to lay and prove a particular day of payment; the case in the *Exchequer* was certainly so determined: but I remember, that gave general dissatisfaction in *Westminster Hall* and abroad, as too nice to require the proof of a particular day; and it has been since adjudged to the contrary, that *on or about* is sufficient; so that they have left off taking that exception in the *Exchequer*. [Vide

See (e) 2 Vol. 514.

(1) See 2 Vol. 514. and *O'Connor v. Cook*, 6 Ves. 674, and 8 Ves. 536, 539.

Carte v. Ball, ante, 3.] Then it rests on the merits; and that depends on the evidence on both sides, which is of two kinds; first, of the fact and usage of payment: secondly, such as arises out of the nature of this *modus*. If it turned on the first, it is the strongest evidence I ever knew against payment of tithes in kind, for which there is no proof on the part of the rector: that indeed, being only negative, would not prevail to take away the common right that is in the rector, if there was nothing more; but in support of the customary payment there is the evidence of some *terriers*, which makes a distinction throughout, between this and the other parts of the parish, where tithes were paid in kind: and there is the rector's own admission of this. As to the remaining objection to the *modus*, arising from the nature of it, as too rank, several indeed have been overturned on this point; but the distinction taken for the defendant is material, that a *modus* may be overturned for rankness, even at the hearing of the cause, where it is for a specific thing, as a lamb, &c. [*Chapman v. Smith*, post, 2 vol. 506.] because the price of the thing may be found from history and ancient records: but that is an objection from a fact, which, because it appears with such a degree of certainty, the court determines without sending it to be tried: but where it is not for a specific thing, there are several other circumstances to be taken into the consideration of rankness; as the difference of value in the course of time. The House of Lords therefore sent a case of this sort to be tried without over-ruling it. If this had come singly upon the rector's bill, it would without any scruple be immediately dismissed; for that would not have hurt the successor: nay, it would be open to the rector himself. But the owner bringing a bill also to establish a *modus*, that would bind the successors in the parish: and it being of consequence, that a great part of the evidence arises from the rector's [41] own admission, if the defendant insists on establishing it, the rector, (unless he submits to that decree) shall have an opportunity to try it at law (1).

(1) The rector submitted, and the *modus* was established.

BAINES v. DIXON, Oct. 31, 1747.

(Reg. Lib. 1747. B. fol. 112.)

A sale directed on the words *rents* and *profits* alone, though generally contrary to testator's intent: *in aid of a creditor* on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to *legacies* upon the addition of the words "*as the rents and profits, &c. should advance the money.*"

A MAN having a son and a daughter, devises his manor of *Ryley* with the appurtenances, and all his other tenements and hereditaments, to trustees and their heirs, in trust for paying his funeral expenses, debts, and legacies, as far as the personal estate should be deficient; then for raising a maintenance and education, at their direction for his son *M.* and his daughter *S.* and all other younger children, whether born before or after his decease, till his son attains twenty-three, and all other younger children respectively attain twenty-one: then all the surplus, as shall arise

from the rents and profits to and among his daughter S. and all other younger children (1.) as shall be then living, at their respective ages of twenty-one, and that the trustees should convey his said manor, &c. to his son M. at twenty-three; he then gives some *legacies* to be paid after the debts with all convenience, as the *profits of the estate should advance the money.*

On a bill brought by the daughter a general account was decreed at the *Rolls*; and after the master's report it was directed, that a sufficient part of the real estate should be sold for payment of the debts and legacies unsatisfied; with which part of the decree the defendant the son being dissatisfied brought an appeal [after a rehearing at the *Rolls*, in which the order was affirmed.]

For plaintiff. There must be a sale, for there is nothing to bind up the word *profits*, which is large enough to warrant a sale, if nothing to confine it: the word *rents* being dropped in the latter clause; and this rule the court came into by several gradations, and will not break through without great reason. This was intended as a beneficial and effectual provision for all younger children: but the testator, being in debt, could not oblige the creditors to wait till the rents should pay the interest and principal: and if so there would be nothing for the children; so that an immediate sale to pay the debts must have been intended. It is no objection, that by this means the provision for the daughter would be too large; for there might have been more younger children; and though that happened not to be the case, the court will not judge by subsequent accidents.

For defendant. The whole charge is to be raised in the same manner. The maintenance and education must mean annual: and no sale can be for that: and the last clause shews, the testator could not intend it; for then he would have directed so much, as remained, to be conveyed to the son, and not the said lands; *convenience* can only [42] mean annual perception of the profits. In *Joy v. Gilbert*, 2 P. Wm.'s 13. the court would not allow a sale or mortgage, because leases were mentioned. So here, there is a particular manner mentioned, by profits, with which intention he makes the minority longer.

LORD CHANCELLOR.

It is true, that where there is no direction for a sale, the court has gone by several gradations. When any particular time is mentioned, within which the estate would not afford the charge, the court directed a sale; and then went further, till a sale was directed on the words *rents and profits* alone when there was nothing to exclude or express a sale. In *Joy v. Gilbert*, the power of making leases excluded a sale, as it would be frivolous, if a sale was intended, which would include every thing. As to the intention, there is not one case in ten where the court had decreed a sale on the words *rents and profits*, that it has been agreeable to the testator's intention: yet the court has, in aid of a creditor directed a sale, by a kind of discretionary power, on the ground of law, that *rents and* (f)

(f) Devise of the profits, devise of the lands, post, 171.

(1) Instead of the following words, "as shall be then living," the statement in R. L. is thus: "in equal portions when his son the defendant M. should attain the age of 23 years, and not sooner, or as soon after as his said younger children should respectively attain the age of 21 years;" and no more of the will is there stated.

profits in a will, mean to pass the land itself (1); the testator intended this as a provision for all his younger children, and might have had more; which is an answer to the largeness of the sum. The word *direction* in this will means *discretion*. This devise to the trustees is an use executed, but abstracted from that nicety, the direction gives them the real estate; and a general trust, not confined to the words *rents and profits*, would have carried a sale, even before the resolutions that those words should carry a sale. It is but conjecture, that this is an implication that debts and legacies shall be paid in the same manner. The word *said*, in the direction to convey, is to be taken according to the subject matter; and there have been many cases of devises to trustees, to pay debts out of profits, and then to convey the lands; yet that shall not hinder a sale, and never has been thought sufficient to limits *profits* to annual *profits*; which would overturn many times cases. The last clause relating to the legacies, is indeed a direction, that they should be paid out of the annual profits, as it is said for the defendant; but it is not the words *profits*, but *advance*, that limits it thereto. It is further said, that the testator intended debts and legacies to be paid in the same manner; but the sense of the words may be satisfied either way; and it would be extending the word *advance* too far to apply it to debts as well as legacies, for which construction there can be no reason: so that a middle way must be taken, and a sale directed for the debts, but the legacies to be paid as the rents and profits should arise, with interest from a year after the testator's death: for they were general legacies and should be paid with interest by

[43] the personal estate, if sufficient: then the lands being only an auxiliary fund, do not vary the right.

(1) Though a sale of land has in many cases been directed on a devise of "*rents and profits*," &c. as post, 171. and Amb. 95. it nevertheless seems that in general and ordinary instances, the natural meaning of the word "*profits*" is "*annual profits*," and that the cases which have extended it further are *exceptions out of the general rule* from particular circumstances. See Mr. Cox's note to *Trafford v. Ashton*, 1 P. W. 418; and *Belt v. Mitchellson*, *ibid*, 227.

ATTORNEY-GENERAL *v.* PARKER (1), Nov. 4, 1747.

(Reg. Lib. 1747. A. fol. 317.)

S. C. 3 *Aik.* 576.—Though an information relative to a charitable use will not be dismissed where a clear right is to be settled, yet the information in this case was dismissed with costs, no charitable funds being in question, and no proof entered into as to an alleged right of election, which it sought to establish (2). Post, 218.

THE parish of *St. James's, Clerkenwell* was a rectory impropriate, and by deed in 1656 vested in trustees for benefit of the parishioners and inhabitants and their successors; there was also a perpetual curacy with a pension; saying nothing of the nomination and election of the curate. The information prayed the court to set aside an election made, and then to declare and establish the general right of election, and to have it settled.

(1) In Reg. Lib. called "*Attorney-General v. Doughty*."

(2) See the cases referred to. Also post, 72. 2d Vol. 327. and 11 Ves. 247.

LORD CHANCELLOR.

The question concerning the right of election, and qualification to vote, depends on this deed of trust, and on the usage in the parish, expounding and putting a construction on the general words thereof; which is the best expositor of such very large and general words in ancient grants and deeds. There is no evidence of the usage contended for by the relators, that it is confined to such housekeepers as paid scot and lot; however that would be proper, if there was no evidence of any usage at all; but as there is, it differs from the case of the *Attorney-General v. Davy* heard before me; for there is very strong evidence, that all housekeepers whatsoever, as well rated as not, did use to vote [see 10 *Ves.* 335.]; and that it has been always so taken by the oldest inhabitants. Then to confine this right to election would be a very arbitrary interpretation of the court, and a material circumstance is the time of making this deed; when very large and extensive notions prevailed. It is said, this must be taken to be a right in the vestry; but this is not governed by what is the right of the vestry; nor intended to be vested in them, but in the parishioners, though there was a select vestry at the time of the making; nothing is laid before the court to set aside the election made [*Attorney-General v. Scott*, post. 413]. As to the question, whether the court ought not to make a decree to settle the right, for that, being a charitable use, the information should not be dismissed; the general rule is so, but does not hold here; for nothing is a charitable use here but the pension, which is not in question. But there is no ground to establish this right, as there is no proof or examination entered into of it; nor will the court at the suit of a few of the parishioners, put the parish to the expence of an issue to settle a right; which may not come in question in several years. The whole of this information must be dismissed with costs.

HODGSON v. RAWSON, Nov. 6, 1747.

[44]

A legacy out of real estate to be paid within twelve months after the death of A. The legatee survives A. but one month; it does not lapse, but goes to the representative. Executors as well as heirs, although not named, may take advantage of a condition.

JEREMIAH HOLLINS in 1738, devised part of his real estate for payment of debts, the surplus to his mother, and another part to his mother for life; and afterwards to his dear cousin *William Rawson*, his heirs and assigns; he and they paying thereout legacies to several persons, which sums he willed to be paid within twelve months next after his mother's decease; charging his lands therewith accordingly. Then he gives all his household goods and furniture to his mother for life, and after her death to his cousin *Rawson*, his executors and administrators, if he shall be living at his mother's death; but if his mother survived, then to her, her executors and administrators (h).

After the testator's death the mother entered, and possessed the real estate, and died in 1744; a legatee of £100 survived her but one month; his executors bring this bill for the legacy against the devisee of the real estate, who was not the heir at law.

(A) The general rule is that charges on land payable at a future day, shall not be raised where the party dies before the day of payment, but there are exceptions where payment is postponed for particular circumstances. Vide all the cases collected on this subject in 2 P. Wms. 512, 4th edit. note 1.

For plaintiff. This legacy was so vested in the plaintiff's testator in his life, as to be transmissible to his representative, though the payment was suspended to a future time; it would indisputably be so, if it came out of a personal fund; indeed the general rule is, that where it comes out of a real fund, it lapses by the death of the legatee before the time. But there are several restrictions thereto, as where the time of payment is distinct from the gift; which is a distinction the court has always taken, and this case therefore differs from *Hall v. Terry* (1), November 9, 1738, which was a devise of land to a nephew, his heirs and assigns, if he shall pay some legacies, within a year after it comes to him by the death of the testator's widow, on whom it was settled by marriage; charging the premises therewith accordingly; a legatee died in the life of the widow; his representative brought a bill for it, as being a vested interest. Your lordship held, that neither the distinction or authorities made for the plaintiff; for that the time of payment was annexed to the gift, and the charge on the land was only according to the gift, and that the legatee died not only before the time of payment, but before the vesting, and therefore it should lapse. But here the time of payment comes in a subsequent part of the will, and distinct from the gift. Another distinction upon which the court has gone, is, where the contingency must certainly happen, and where it may not: for in the latter case it never vested: as was determined in *Atkins v. Hiccocks*, [1 Atk. 500] July 18, 1737, which was a devise to a daughter of £200, payable at the time of marriage, or three months after, if she married with consent, and £12 *per ann.* till it was paid; the daughter died unmarried; it was held not to be due; for the contingency being

[45] uncertain whether it would come or no, the testator did not regard the time, but the event, which was the marriage; but that is not applicable here; for it was certain this time would come, and it was no question with the testator, whether the legacy should be paid or not. Then the suspending the payment does not vary the right of the party already vested; but was only in favour of the devisee, to give him an opportunity to raise it. This distinction of suspending in favour of the legatee or devisee, was held proper in (k) *Sherman v. Collins*, February 4, 1745, which was a devise of £300 a-piece to two daughters, to be paid by his executor when he attained twenty-six, charging two closes therewith; and both daughters died, before the executor's attaining twenty six. But where the circumstances of suspending were on the part of the legatee, it was a reason for bringing it within the general rule of not being transmissible; but the suspending here was an abundant caution in favour of the mother, that she should have the whole; and that there should be no diminution, till it came to the devisee over. *King v. Withers*, Talb. 117, is stronger than this case; for there, though the contingency was uncertain, yet it was held vested and transmissible; the event in the testator's view having happened. In *Lowther v. Condon* (2), there was a devise, after having given £500 a-piece to two daughters, of a further sum of £1000 a-piece to be raised and paid them immediately after the death of the wife. One daughter died before the wife; and though the general rule

(k) 3 Atk. 319.

(1) *Hall v. Terry*, 1 Atk. 502; but much better reported 8 Vin. Ab. 333.

(2) 2 Atk. 127. Barn. Ch. Rep. 327.

took place against her representative; yet your lordship held, that the circumstance of payment after the mother's death was in favour of the fund, and it should be the same as if out of personal estate. The case of *Bulkeley v. Stanlake* is an authority, that a contingent interest is transmissible. *Hutchins v. Foy, Comyns* 716, is also an authority, that a legacy is transmissible, though the legatee died before it was payable: and it is material here, that in the devise of the personal estate where the testator intended the legatee should not have it, if he died before, he has expressly said it.

For defendant. According to the general rule this legacy lapsed and sunk into the estate by the legatee's dying within the year after the mother's death; which rule, though at first it might arise on a particular occasion in *Pawlet v. Pawlet*, 2 *Ven.* 366, and 1 *Vern.* 204, 321, has since become general in a charge upon land; as it is in this court, even without the express words, and the *ecclesiastical* court is followed here only in a charge on personal estate. One exception to the general rule is, where there are two times of payment; one regarding the contingency of the person of the legatee, the other regarding the fund; which was the case of *King v. Withers*, where the time regarding the person having come, the court held it transmissible, though the other event had not happened. A second exception is, where from the other words in the will the testator meant it should not sink into the estate; and that was the ground in *Lowther v. Condon*; which case has not been cited [46] wholly; for it was to their respective executors, administrators, and assigns, if one daughter died before; and expressed to be for benefit of the survivor, not to sink for benefit of the heir. A third exception has been attempted, which the court will not admit; the distinction of the legacies being postponed from reasons regarding the person and the fund. If this case is not within the general rule, it must be on one of these two grounds: first, that supposing the legatee has died in the life of tenant for life, it should be raised; but then it would be a direct contradiction to *Hall v. Terry*; for there is no difference between *so as he shall pay* and *he paying*; and there the court clearly thought, that if the legatee had died in the life of tenant for life, it should not be raised; for the court so thought, though the legatee survived. So would it contradict *Bradley v. Powell, Talb.* 193. The second ground must be that there was such an inchoation of right, by the legatee's surviving one month, as to make it payable; but the court has not gone upon that, and never considers the legacy payable till compellable, which it is not here, though the devisee might pay it sooner (m). *Hall v. Terry* is in point; it was objected there, that it was an absolute gift, but the time of payment postponed; the court held that immaterial; for in respect of land, that objection never was made. (n) *King v. Withers* was there cited, but the court distinguished it, because of a double time of payment, one of which had happened; and here there is but one time of payment. (o) *Van v. Clark*, 21 *July*, 1739, (cited in *Comyns*) is also in point; where your lordship held, that a legacy out of real and personal estate to be put out to interest, and paid at eighteen or marriage, should not go to the representative of the legatee dying before. (p) *Sherman v. Collins* turned on very particular

(m) 1 Atk. 502.

(p) 3 Atk. 319;

(n) Talb. 117.

(o) 1 Atk. 510.

circumstances; and there was a clause of entry given to the legatee, on which he might maintain an ejectment; and so it is to no purpose to argue it on this rule; nor are the other cases to be taken in the latitude contended for.

December 9, 1747. *Lord Chancellor* having taken time to consider of it, pronounced his decree. Consider first how it would stand at law; then how it stands in and is altered by equity. As to the first, taking it as a conditional or contingent legacy, it is clear that the executors may have the benefit of it; as in *Salk.* 170, where the condition of an obligation was to make a lease, or pay £100; the obligee dying, though the election was taken away, it was held, that his executor should have the £100, which determination is agreeable to the rule of law in cases of heirs; where the heir, though not named, may take advantage of a condition annexed to a real estate. In *Marks v. Marks*, *Equity Ab.* 106, there was a condition to gain an estate, on payment of money in a limited [47] time; the party died before the time, his heir was relieved. 2 *Vent.* 347, cited in *King v. Withers*, was decreed on that ground, that a contingent interest (q) is transmissible to the representative. Thus it stands at law with respect to the plaintiff. With respect to the defendant it was a devise on condition of paying; for the devisee not being heir at law, but a stranger, it was a direct condition, not a conditional limitation. Therefore *Wellock v. Hamond*, [*Cro. Eliz.* 204.] cited in *Boraston's* case, 3 *Co.* 19, is not like this; there it was a conditional limitation. Here is no occasion to go by that circuity, being a devise to a stranger, and a condition, of which the testator's heir at law must take advantage; who may bring an ejectment against the devisee for a breach in not paying, since at law the benefit of the contingency is transmissible. Then the testator having expressly created a charge on the land, it will bind the land in the hands of the heir, after his recovering in ejectment.

Then as to the alterations in equity; the general rule is, that a legatee dying before the legacy is demandable, it shall sink into the estate. But here being a plain right at law, and the land recoverable for non-payment, it would be strange to deprive the legatee of it, and repugnant, that the devisee should lose his land for non-payment, and yet the legacy itself lost in equity. The general rule in *Pawlet v. Pawlet*, and a multitude of cases is the same; whether it is at the day, or payable at the day: that distinction being admitted only in personal legacies. The intent was, that the legacy should vest, as soon as the remainder came into possession, it being *he and they paying thereout*: which could not be, till they were intitled to the profits; but it was also intended to give the remainder man a year's time. The testator must have had in view the legatee's dying in the mother's life, having expressed it afterward, where he intended it should defeat the legacy; which not having done here, it is an evidence of his not intending it; and the defendant's counsel admit there are cases, where the intent will controul the general rule; as in *Lowther v. Condon*.

As to authorities, the first is *King, v. Withers* (2.) The second, *Bulke-*
(q) *Post.* 537. 8 *Vin.* 112.

(1) See the distinctions taken, and the cases in support of each, collected in Mr. Cox's note to the *Duke of Chandos v. Talbot*, 2 *P. Wms.* 612.

(2) *Talk.* 117.

ley v. Stanlake, and (r) *Hutchins v. Foy* (1), which was a bill not brought in the *Exchequer* for a legacy charged on an estate, as administrator to the wife, who died before the legacy was payable. It was held to be transmissible on this ground; that the remainder vested immediately by the death of the testator; and therefore the legacy vested in those, to whom payable, and that the devisee must take it *cum onere*; it being equally intended that the legacy should be paid, as that the devisee should have the estate; which is the same here, and the estate recoverable for a breach. These cases are strong authorities, that the estate is chargeable, notwithstanding the death of the legatee in life of the tenant for life, and before the remainder attached in possession; but there is something more here, *viz.* that this twelve-month clause was not intended to suspend the vesting, and make it contingent; but only as a reasonable time to the devisee for payment, which he could [48] not do, before he was possessed: and there is a case upon that ground only, which is *Wilson v. Spencer* (2) *January 31, 1732*, where the testator devised the payment of his debts and legacies by and out of such part of the personal estate, as should not afterwards be specially devised; and if that proved deficient, then out of the real estate; and that his executor should within twelve months after his death levy and raise sufficient to pay £1000 to the younger son, to be paid to him immediately when raised; charging all his real estate, if the personal estate not specifically devised proved deficient. The younger son died before the expiration of the year: his executors bring a bill for it against the eldest son the devisee, for life, of the real estate with a remainder to his sons. The defendant admitted it was intended for his brother's advancement; but insisted, that he dying unmarried before, it was extinguished, and not to be raised: the personal estate was admitted to be deficient, and it was therefore chargeable on the real estate, and to take the fate of a legacy out of real estate, as it has been decreed. The court held, it should be raised; which is an authority, that the year for raising was not sufficient to prevent the legacy's vesting; and was the single ground of that determination, *Hall v. Terry* is distinguishable from this; there I thought, that as to the penning of that legacy, the time was annexed to the gift or substance: and though it had been out of personal estate only, it would not be transmissible (3.) So it was likewise in *Van v. Clark* (4,) and therefore the court, which favours real estate, will never hold a legacy transmissible, which would not be so if payable out of personal estate only. But whether those cases are applicable or not, this twelve months time given is a sufficient ground for this decree within the authority of *Wilson v. Spencer*; therefore this legacy must be raised and paid with interest at 4 *per cent.* from a year after the mother's death, and the plaintiff must have costs; so decreed in *Wilson v. Spencer*: though there was more doubt (5).

(r) 1 *Brown*, 191.

(1) *Com. Rep.* 716. *Godwin v. Munday*, 1 *Bro.* 191, *S. P.*

(2) 3 *P. W.* 172 imperfectly stated above.

(3) See note to p. 44.

(4) 1 *Atk.* 510.

(5) See *Tunstall v. Bracken*, *Ambl.* 167, and 1 *Bro.* 124, note *S. C.*

N. B. In the cause *Lord Chancellor* said, that there was no case, where the court has by way of rule laid down the distinction between suspending the payment with a view to the person of the legatee and the fund: though there were cases, where it has come with other circumstances.

MERITON v. HORNSBY, Nov. 9, 1747.

Master has a right to earnings of his apprentice who quits him (u).

THE bill was brought by an apprentice, who had with consent of his master quitted his service to go on board a privateer; to be relieved against a claim made by the master to the plaintiff's share in a great prize the *Marquis d'Antin*, and to have that share paid by the managers to him.

[49] *Lord Chancellor* said, such actions were very common at law by masters against their servants, who had quitted them to go to sea; in which the masters recovered their earnings; so that the master's right being strictly legal, let him bring an action at law, in what court he will, for this share against the managers; in whose names the apprentice should be permitted to defend it (1).

(u) Where master consents to the discharge of his apprentice, bill will not lie for a return of the fee; 2 Brown 78.

(1) *Barker v. Dennis*, Salk. 68. 6 Mod. 69. S. C. Skinn. 579. See *Hill v. Allen* post, 83.

SIPTHORP v. MOXTON, Nov. 10, 1747.

S. C. 3 Atk. 580.—A woman by will forgives a bond-debt to her son-in-law, and desires her executor to deliver up the bond to be cancelled; this held not to be lapsed by his dying before the testatrix (2).

THE testatrix gives several legacies among her children; and then says "I likewise give my son-in-law *Chillingworth* a debt of £500 he owes me on a bond and interest; and desire my executor to deliver it up to be cancelled." *Chillingworth* died intestate in the life of the testatrix leaving her daughter his widow; who took out administration, and brought this bill against the representatives of the residuary legatee to have the bond delivered up.

For plaintiff. The general rule, of a legacy's lapsing by the death of the legatee in the life of the testator, is not applicable here; the testatrix intending by her will that the debt should be extinguished; which must necessarily go to the representative of the debtor; for it is not like a gift of a sum of money. A will may be so penned, as that though the legatee dies before the testator, yet his representative should have it; for though at law a debt cannot be released by will, yet in equity the intent to discharge it will be considered. *Elliot v. Davenport*, 1 P. Wms. 83. 2 Vern. 521, is in point; for it was admitted there, that if the devise over of part of

(2) Vide several observations on this case, &c. 1 Cox, P. W. 86. note 2. 5th edition.

the debt had not shewn it was not intended to work by extinguishment, it would not have lapsed.

For defendant. This is of a legatory nature, and therefore lapsed within the general rule; for a will cannot release a debt. 1 Vent. 39. 1 Sid. 421, as it cannot take effect till the death of the testator, and the necessity of having the executor's assent to make it good, proves it a legacy. The intent of the testatrix may controul the general rule; but it must be very plain, and the penning very special (1). *Elliott v. Davenport* is a stronger case for the defendant: in whose favour the determination there is (2). Here it is not given to him, his executors and administrators, as there; the only person described to take being the son-in-law, and the bounty designed personally to him; who was also the sole object of the view of the testatrix in the latter clause, which is dependent on the former that it should be delivered up to him, if the legacy took effect. The reason of lapsing is that otherwise it might go to a far different person than was intended: there is nothing importing a general remission, but only to that particular legatee; and the court cannot supply a new one.

LORD CHANCELLOR.

I must begin with saying, as Lord Cowper did, that this is a [50] very doubtful case; yet I am of opinion that the plaintiff ought to have the benefit of this discharge of the debt, and that the bond should be delivered up to be cancelled: the testatrix was a mother providing for the different branches of her family; and it would be very harsh, if it should happen by the construction of this will, that the rule should be so strict, that by the son-in-law's death her daughter, so nearly related in blood, should lose the benefit intended to this branch. It is truly said for the defendant, that giving or forgiving a debt to the debtor is a testamentary act, and to be considered as a legacy with regard to the administration of assets, and therefore cannot take effect but by the assent of the executor; for creditors may have a right to it upon a deficiency: but it is otherwise as to a dispute with the executor, or a voluntary claimant. It is also truly said for the defendant, that it cannot operate as a release, and the obligor could not plead it so in an action by the executor; yet in equity it is considered as an extinguishment, though it wants the form of a release (3): and this court would in such a case grant an injunction against the executor, if it was not wanted to pay debts. To desire, in a will is the same as to direct (4); and it is admitted at the bar, as in *Elliot v. Davenport*, that the latter part, if it stood alone, would be a discharge, though the legatee died before; but it is objected, that this is ancillary to the former clause, so as it will not prevent the lapse; and it is capable of that construction. But the question is, what construction the court ought to put upon it? which is that it is not merely ancillary, but a further declaration of the intent of the testatrix, that at all events the bond should be delivered up and extinguished in whosoever hands; which makes it plain, agreeable to the admission above mentioned; and to construe the intent otherwise, would be least for the benefit of the family. As to the

(1) See *Sibley v. Cooke*, 3 Atk. 572.

(2) See the report, 1 P. W. 86.

(3) See 2 P. W. 331, 332.

(4) See in *Dashwood v. Peyton*, 13 Ves. p. 41.

case of *Elliot v. Davenport* (1), there was some colour for its being cited on both sides: but there is an express giving to, not a forgiving of the debtor; which it is truly said generally makes no difference: but not so there, where it was not intended to be a release, but that the recognizance should still subsist as a security to the children till paid; which makes it materially different from this case, where the intent plainly was to forgive the debt, and that the bond should be delivered up absolutely. Nor is there any thing in the difference, where the remission is general, or to that particular legatee; for it would make a bounty intended for a family very precarious, should the court go on such nice distinctions.

But no costs in this case.

[51] LEMAN v. NEWNHAM, Nov. 11, 1747.

(Reg. Lib. 1746. B. fol. 123.)

Exoneration—Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had covenanted to pay them.

Where no demand of principal or interest for 20 years, satisfaction will be presumed: except in cases of mortgages; mortgagee is supposed continuing in possession, and mortgagor tenant at will to him.

Testator desires all his debts may be discharged by his executors; adding "I mean those only of my own contracting, not those heavier debts by my family;" gives his personal estate to his mother, whom he makes executrix, desiring her to pay all his just debts exactly. Long after making the will the mother buys in mortgages charged on his estate by his ancestors, and the son covenants to pay the money. The personal estate is still exempted from the principal and interest due on those mortgages, which are still a charge on the real.

SIR WILLIAM LEMAN possessed of a real and personal estate, the real incumbered by several mortgages of his ancestors, made his will, in which he says, "I desire all my debts may be discharged by my executors; I mean those only of my own contracting: not those heavier debts charged by my family." He then gave several legacies, and then his personal estate to his mother, whom he made executrix; desiring her to pay all his just debts exactly.

Long after the making the will the mother bought in those several mortgages, which were assigned to her, and for the payment of which the son entered into a covenant. He died in 1741, and there had been no payment or demand of principal or interest for twenty years. In 1744, the mother brought a bill against the present plaintiff and defendant, who were the coheirs at law of her son, for payment of those mortgages, or else that they should be foreclosed: but she dying makes one of the coheirs her executor: who gets his name struck out of the original; and now brings a bill of revivor against the other coheir, for a sale of the mortgaged premises, that out of the money arising thereby, the principal and interest due should be paid by the defendant; the plaintiff claimed by a double right, as executor of the mother, who stood in the place of the mortgagee, and as coheir of her son.

Master of the Rolls, Sir William Fortescue.

Waving the objection to the manner of bringing this bill, and consider-

(1) See the note to 1 P. W. 85, 86. 5th edit.

ing it on the merits, it is a proper bill, and a proper relief may be given. It is truly said, that the plaintiff coming here for equity shall be obliged to do equity; and that equity is, that if the court directs the payment of the mortgage money to him, he must bear an equal share in the burthen, he having a moiety of the land.

There are two principal questions here: the first is, whether these mortgages are still subsisting, or satisfied? next, if subsisting, out of what fund they are to be paid?

As to the first, the defendant insists, that there being no principal or interest paid or demanded for twenty years, the presumption of law is, if nothing else, that they are satisfied: and that twenty years is the proper time of limitation both in law and equity; as in bringing an ejectment. And in common cases it is so; but not in mortgages, because the mortgagee shall be supposed continuing in possession and the [52] mortgagor's possession shall be his, being tenant at will to him.

It is said that in case of a bond (x), where for twenty years neither principal nor interest was paid, a jury will of course find it satisfied; and that it were absurd, where a bond is a collateral security for a mortgage, that the bond should be found satisfied, and the mortgage still due. But that would not be the case, for in an action on the bond, if the jury were not convinced that the mortgage money was paid, they would not find the bond satisfied: but if the court was satisfied that the money was paid, they would not suffer the mortgagee to bring an action on the bond; which brings it to the question, whether it was paid or no; and it is certain that nothing has been ever paid. If it stood singly on the twenty years elapsed, and no evidence either way, it would be very difficult for me to determine so large a sum to be satisfied, without putting it in some way to be tried: but there is no evidence of its having been paid; and strong evidence that it never was. If the money never was paid to the mother, yet if she had given it up to the son, it would have been a satisfaction; and her bringing that bill would not have revoked it: but the fact appears otherwise, and shews the reason why no principal or interest was ever paid; for her intention was not to demand it in her son's life, yet not to part with her whole right, but keep it in her power; and therefore would not have the mortgage delivered to him: and though this is parol evidence, it is not to set aside, but in support of a deed, and destroys the presumption arising from length of time. So that these are still subsisting mortgages.

As to the second question; the defendant insists they should be paid out of the personal estate, as the proper fund for payment of mortgages; and that though the mortgagee may come on the lands against the heir at law, he may have remedy against the personal estate; which is the general rule. To this the plaintiff replies; that this differs from the common case; the mortgages being originally the debt of the testator's ancestors, whose estate, having received the advantage of the mortgage money, should bear

(x) In such case the judge will direct the jury to find it satisfied; 2 Atk. 144: 20 years without any demand is of itself a presumption that a bond has been paid: Lord Mansfield said, there is a distinction between length of time as a bar, and where it is only evidence of it, the former was positive, the latter only presumption; in such case no time had been expressly laid down by the court, it might be 18 or 19 years. Durnford and East, 270. 272: 1 Burr. 434: In 4th Burr. 1963, Lord Mansfield says, 20 years without demand is a good presumption of payment: In Finch, 77, perpetual injunction granted against a bond of 56 years standing.

the burthen, and not the estate of the testator: for which purpose two cases occur to me, *Bagot v. Oughton*, 1. P. Wms. 347, and *Evelyn v. Evelyn*, 2. P. Wms. 659; where this court went so far as not to make the heir's personal estate liable, because it was originally the debt of his ancestor; though there was a particular covenant on his part, and the equity of redemption in him. It is said, that though this is so, where of heir of the mortgagor takes an estate-tail for life, yet it is not, where he is tenant in fee: and that in the present case it is the same, as if it descended to him as heir at law; in which case the covenant signed by him cannot be collateral security, as he cannot be security for himself: to which it is replied, that it did not descend to him. But I see no [53] difference, where the equity of redemption descends to the heir at law in fee, or where the legal estate incumbered with several mortgages descends to him in fee.

But the will is the proper rule to go by, as far as it directs; by which, it is agreed, he had a power to charge his real or personal estate with these mortgages; so that the question is, whether, and how far, he has done it? It is insisted, that the personal estate being the proper fund, it cannot be discharged without particular words: and therefore, though there be a direction for payment of debts out of the real estate, that shall not change the fund, but it shall only make good any deficiency of the personal estate. That is the general rule, but here there are express words of exemption: it is said, that though there is this exemption in the first clause, it is not in the latter, where he directs all his just debts to be paid exactly. In answer to which, it is a constant rule, that one part of a will is not to be construed contradictory in another, if both will stand: and where the testator has so particularly explained what he meant by his debts, it would be hard to give it a different construction. It is farther objected, that the mother's buying in those mortgages, and the son's covenanting for the payment of them, was after the making the will, whereby he made them his own debts, and they no longer came within the description of his *heavier family debts*. But the will must be to speak from the testator's death, and be looked upon, not only as his last will, but last words: so that where a will charges a real or personal estate with debts; any debt contracted after, are equally liable to be paid. Wherefore though by the covenant he makes himself liable to her representatives, yet that does not vary the description of the thing given to the will. So that the testator having discharged his personal estate, they are a charge upon the real (y); and only those contracted by himself charged on his personal estate: this also determines the objection as to the interest, which was said to become his own debt; but that as well as the principal is within the description of heavier debts; for it would be strange to charge them upon separate funds.

An attachment for non-appearance was taken out before the bill was entered in the bill-book, though filed in the Six Clerk's office.

Lord Chancellor seemed to think an entry in the bill-book necessary to

(y) Prec. Ch. 2, 101, 456, 477. 2 Vern. 701. 1 P. Wms. 291, 347: 2 Brown 101. In this and some other cases the personal was held not to exonerate the real, but these were determined upon particular circumstances which took them out of the general rule, which always take place, unless the real estate is, from the nature of the contract, primarily liable, and then no collateral security, such as covenants, &c. shall alter the fund; 2 Salk. 449. 4 Mod. 12. Post, 251, 312. vide 2 P. Wms. 664, 4th edit. Note 1, where all the cases on this head are collected.

give the party notice; for private notice to his attorney is not sufficient; but being doubtful of the course of the court, he referred it to a master.

It is not the practice now, as formerly, to make out a *subpana* before the bill is filed (1).

[54]

(1) See the acts for the amendments of the law, 4 Ann. c. 16. s. 22.

WALKER v. WALKER, November 17, 1747.

(Reg. Lib. 1749. B. fol. 439.)

Covenant by deed before marriage to settle on wife, if she survive, part of the real estate for her jointure, and in full recompence of all dower or third which she can any way claim, &c. out of any lands, &c. of which he is or shall be seized of freehold or inheritance; she is hereby barred from claiming as her *free bench* copy hold purchased afterwards.

A MAN, in consideration of his marriage, and to make some provision for his wife, by deed executed before the marriage, settles upon her, if she survives him, part of his real estate for her jointure, and in full bar and recompence of all dower or thirds which she can be intitled to or any way claim out of any lands, tenements, messuages, or hereditaments, of which he now is or ever after during the coverture shall be seized of freehold or inheritance. He having afterward purchased copyhold estates (1), she upon his death gets into possession of them as her *free bench*.

The heir at law brings a bill for an account of the rents and profits against her, as being barred thereof by the deed; and it was argued for the plaintiff, that the word *inheritance* was not opposed to an interest for life, but meant to take in every other kind of inheritance, which the husband might have, such as copyhold; the word *freehold* before, meaning freehold inheritance.

For defendant. Those words were never so opposed before: if that was the meaning, *copyhold* would be expressed; as it must in a general devise of land; otherwise it will not pass. A provision of copyhold for a wife is never called *dower*, nor is *free bench* a customary dower; it being in the husband's power, and depending on his dying seized thereof; and it could never be intended to include in the treaty what it was uncertain whether she would ever be intitled to: the words *some provision* expressed, that she was not to be excluded from any other, that might afterwards be left her. The plaintiff has precluded the defendant from proving declarations and an intention to provide further for her, by not replying to the answer; which therefore must be taken to be true in all its parts.

LORD CHANCELLOR.

■ The plaintiff's coming here is an admission that the law is against him, for otherwise he should have brought an ejectment; and it is so, for the statute 27 H. 8. (2) does not extend to copyholds; all the clauses expressly relating to dower at common law; but for *free bench* no writ of dower lies; being only an excrescent interest out of the husband's estate: but upon this settlement the plaintiff is inti-

[55]

(1) He only purchased one of them, after making his will. R. L.

(2) 27 Hen. 8. c. 10. sect. 6. Vide Gilb. Ten. 182.

tled to relief. There are several cases, where by provision of the husband, a wife may be barred of dower, where the common law would not bar her: as out of personal estate, if so framed as to import a jointure, whether expressed or no; which the court does by way of enforcing the agreement of the parties, and to present double satisfaction. It was so decreed by Lord Somers, 2 Vern. 365, which indeed was reversed by the Lords; for that in a bare devise of land, without more, the court will not intend it to be in bar of dower. [See *Tinney v. Tinney*, 3 Atk. 8.] But in a late case before Lord King of *Vizard v. Longdale*, on a bond before marriage for the wife's livelihood and maintenance, it was held a satisfaction, though the word *jointure*, was not used; the reason of which extends to the present case; which is very strong to bar her. The circumstance of his being a very old man, and marrying a young widow who made a very prudent bargain for herself, will not influence here. If it had gone no further than the word *jointure*, I should have thought it intended to bar her, not only of what the statute would bar her, but of any other demand as a widow. Suppose it were only articulated before marriage, that it should be for her jointure, and not carried into execution; on a bill for performance the court would bar her of free bench as well as dower. This is said not to be dower, and it certainly is not thirds; being a claim of the whole; but it is sometimes analogous to dower; therefore though not strictly within the words, it will be proper to give it a liberal construction. Dower is also, as well as free bench, in some cases in power of the husband; for though he cannot convey away, he may forfeit; as for treason within the statute of Edward 3. The plaintiff's construction puts on the words *freehold or inheritance* is right; it being the meaning of the parties. There is no dower unless out of inheritance: and then the word *inheritance* afterward is tautology, unless applied to some other *inheritance*: and copyholds are inheritance by the custom of the realm; for though this be a nice construction, yet the court often does it to attain the intent of the parties. What I chiefly lay stress upon is, that for her, *jointure* alone would do; but not on that singly. The words *provision if she survive*, mean the same as in *Vizard v. Longdale*, and the word *some* makes no difference; for it is not said *some part*. This then was the intent, and if the declarations set out in the answer had been proved, they would have been of little weight, and a contrary construction would introduce a dangerous precedent in families; for there are few estates that have not some copyhold mixed; of which perhaps the owner knows not; and it would be mischievous to let the widow claim it.

[56] LORD UXBRIDGE v. STAVELAND (1), Nov. 25, 1747.

(Reg. Lib. 1747. A. fol. 339. 340.)

Demurrer lies to a bill for discovery of an assignment of a lease without license, if it does not expressly waive the forfeiture.

Collateral covenant in a lease not running with the land binds not assigns.

This bill was brought by the plaintiff against the defendants, to discover whether there was an assignment without licence of a lease to him,

(1) Entered in the Register's Book under the title of "*Earl of Uxbridge v. Statham*."

wherein there was a covenant, that the lessee, his executors, administrators, or assigns, will grind all the corn, grain, or malt, they shall have occasion to use or spend, at the plaintiff's mill, according to the custom; and to discover what corn, &c. has been used that was ground at other mills: to have a satisfaction for it: and that for the future it may be ground at the plaintiff's mill.

The defendant first demurred to the discovery without licence; because the plaintiff had not waived the forfeiture; citing *Eq. Ab.* 77.

To which it was answered, that the bill was not brought on the foundation of the forfeiture, or determination of the estate.

Lord Chancellor allowed the demurrer, for though the bill goes on the foundation of the defendants being assignees and tenants, yet there is a difference between an implied affirming them tenants, and an express waiving the forfeiture: for if the defendants now make the discovery, the plaintiff might immediately bring an action thereon: nor could the defendants come here for an injunction; which would be otherwise on the express waiver.

It was next demurred; for that the plaintiff had not charged or averred the defendants to be assignees; but only that he was informed by his steward. But if he had, this was a collateral covenant, and not running with the estate; and therefore bound not assignees, according to *Spencer's Case*, 5 Co. 16, and both the custom and covenant are too extensive and unlimited.

These demurrers were also allowed; for the custom was plainly unreasonable, as set forth: if it had been a good custom, it might have helped this part of the case, because the covenant refers to it. Then within this covenant corn for the horses, &c. of the defendants must be ground; and to whatever distance the defendants removed to live, they must bring it to the plaintiff's mill; so that this is a collateral covenant, and not to do any thing relative to the premises leased; had it been covenanted to grind all the corn, &c. they should spend ground, it might relate to the premises; and running with the land, bind the assignee. The covenant, though it will bind his executors being representatives, will not bind assigns. But setting all this aside, supposing it would bind assigns (a) they ought to be shewn to be assigns in a bill here, as in a declaration at law; which is not done; so that all possible objections concur against the relief prayed.

As to the demurrer to the discovery of what corn, &c. had been ground at other mills, the defendants, by the denial in their [57] own answer, have over-ruled it.

(a) Defendant may demur if plaintiff does not show some ground to charge him. 1 Vern. 180.

VANE v. VANE, Nov. 25, 1747.

(Reg. Lib. 1747. B. fol. 95, 96.)

Construction of a trust, surplus rents, &c. not included in the term "*portion*."

MORGAN VANE, a younger son of Lord Barnard, by his marriage settlement in 1731, recites the provisions he was intitled to by his father's settlements; and among the rest to an equal share of £2000 after the father's

death; then there was a trust for the benefit of the issue of the marriage; and a covenant by him, that all such share and proportion of the said £2000 or any other sums provided for the portion of the younger children of Lord *Barnard*, as should afterwards come to him, should be within the aforesaid trust.

The surplus, of the rents and profits of Lord *Barnard's* real estate limited for the benefit of his children, after some particular provisions, was in 1744, during Lord *Barnard's* life, decreed to be distributed among his children. The present bill was brought against *Morgan Vane* by his children to have his share of that surplus, and any that should be afterward paid him by order of the court, placed out for the benefit of the plaintiff, as being comprised within the trust of his marriage settlement in 1731.

LORD CHANCELLOR.

Though this case is not quite free from doubt; yet on the construction of the trust, considered with the circumstances of the case, I think the plaintiffs have no right or interest in the defendant's share of this surplus (1). Had it been the intent to extend the trust thereto, they would not have omitted it in the recital of the whole, *Morgan Vane* was intitled to in his father's life and afterward. It can go no farther than what was portion for the younger children: and thus surplus cannot be considered as such, for being for all the children, it takes in the elder also; and the elder, if alone surviving, would have the whole. Nor is it true, that the trust would take in any other provision by Lord *Barnard* for *Morgan Vane*; for a legacy would not be comprised therein.

(1) So declared, and the bill dismissed without costs. Reg. Lib.

MADDISON v. ANDREW, Nov. 27, 1747.

(Reg. Lib. B. fol. 119.)

Power. Illusory appointment (1). "Legacy given to the children" of S. she then having but one, held for the benefit of all born, or to be born. Testator, on renewal of a lease, takes it in the names of his brother and himself, paying the fine and receiving the profits himself. Held not to be assets, but vested in the brother beneficially, upon the ground of intention, though proved but by one witness. Power to charge a particular sum reserved by owner of the inheritance not executed in his life-time, held to be executed in substance by his will, charging debts and legacies on all his real and personal estate though it did not refer to the power. Illusory trust.

Legacy to be paid (a) at future day is vested, but not where the sum is not certain.

Power of appointment by mother may be unequally distributed, but not so as to be illusory, unless there is a great misbehaviour (2).

Discretionary power of a parent to appoint, not being executed, does not devolve on the court.

Power reserved by the owner of an estate to be construed liberally, and no occasion to refer to the power if it is done in substance.

ROBERT ANDREW, having a wife, two sons, *Robert* and *John*, and three

(a) Ante, 44. Post, 207. 2 Brown, 75.

(1) Vide *Butcher v. Butcher*, 9 Ves. 382, 378, and 1 Ves. & Bea. 79.

(2) See the notes and references to the *Duke of Marlborough v. Lord Godolphin*, post, 2 Vol. 61, &c.

daughters *Grace*, *Anne* and *Sarah*, by his will made 21st July, 1732, devises his real estate to his eldest son; gives all his children £800 portion a-piece, makes his wife executrix, and residuary legatee: then by a clause in the will gives £600 to be by her disposed of to and amongst [58] *his three daughters in such proportion, and payable in such manner, as she shall think fit to give it in her life, either by will, or by any note or deed in writing subscribed by her in the presence of witnesses, or by any other disposition.* The mother on the marriage of her daughter *Grace*, by verbal agreement, gives her £200, and afterwards making her will takes notice thereof as a part and proportion of her share of £800, and in further pursuance of her power gives her an additional £100, then gives her daughter *Anne*, who was dead, and to whom she was executrix, her share of £200, and declaring that as her daughter *Sarah* had behaved undutifully, and married the present plaintiff without her consent, she would have only the remaining £100, and dies, leaving her son *Robert* sole executor and residuary legatee; who had made a voluntary settlement of real estate on his brother *John*, remainder over to his sisters: but he created a term of 1000 years, vested in trustees, that he might by any deed or act executed in his life, limit or appoint any part of the premises to raise any sums not exceeding in the whole £4000 in his life; which if not done in his life, and he should die unmarried and without issue, *he should have power to charge, limit or appoint any sums not exceeding in the whole £1000: and not having charged in his life as above mentioned, and having no wife or issue, he makes a will, and first directs all his just debts and legacies to be paid, charging all his estate real and personal therewith; then gives a legacy of £300 to the children of his sister Sarah, to be paid by his executor, and equally divided share and share alike, at their respective ages of twenty-one or marriage, with interest at four per cent. and failing the share of any, to the survivors; and failing the share of all to his sister Grace; and subject to all this, gives all his estate real and personal to his brother John.*

The first general question, and the most considerable, was as to the £600, *Sarah* claiming an equal share thereof by the testator's will; and for that purpose to have the mother's distribution set aside, and the £200 appointed to the deceased daughter *Anne* given to her.

LORD CHANCELLOR.

The power of distribution given to the mother is very large, though confined as to the objects; and the intent was to give her a kind of distress over the daughters. It must be admitted there is a good appointment of the £300 and £100, and if there had been any defect in the verbal agreement, which there was not, the will made it good. The only question is, on the £200 appointed to the deceased daughter *Anne*; and which if it was to vest, could only vest in her executrix, who was the mother herself. Several questions have been made thereon; [59] the first, if it be any question, is, whether the appointment of it is good? if it is, all the other questions are out of the case: if it is not good, then the next question is, whether *Anne* was intitled to any interest transmissible to her executrix? and if not so, then how the court is to direct the distribution; whether equally or discretionary as the mother might?

As to the appointment it cannot be maintained; for the mother being limited as to the objects, could appoint it to no other. The testator plainly

intended it personally to them, to keep them obedient, and had made other provision for them. If therefore *Anne* had left children, although it would be hard; yet the mother could not give it to them, they not being persons within the description of the power: then much less could she give it to her executor or administrator, who might be a stranger to the family, and so contrary to the testator's intent: as it is in all directions of powers confined to the persons of the objects.

Then secondly: Whether the mother as representative can claim this by the father's will in default of appointment; which depends on an interest transmissible, being vested in *Anne*, and I think there was not such an interest: as to the vesting or not vesting of legacies, there are several distinctions taken both in the *ecclesiastical* court, and this court, which follows the *ecclesiastical* court as to legacies of personal estate (*b*): as where in general it is to be paid at a particular day; it is vested, and the time of payment only postponed: but there is no case where the court has held a legacy or interest therein vested, where the certainty of the sum could not be said; as here it could not at the death of the father: so that it was contingent and suspended till the mother's execution of the power, or till it was at an end. To avoid this it is insisted, that this clause must be construed a gift among them equally, subject to be divested, and the shares to be varied, by the appointment: but the words of the clause will not bear it; for it is not a gift to the daughters, but to the wife to give, &c. nor are there any words of equality. If it could be a bequest to them, it would be joint, and to survive; which without more would put an end to the question for *Anne's* representative. But the consideration of the mother's power over it, shews further, that it was contingent, not vested; the words *such proportion* vary the proportion, she being the judge of it (*c*); and if she makes an inequality, the court will not enter into the motives of it, unless it be illusory; as in a case where a mother, having such a power, gave only an eleventh part to a step-daughter. Yet even where but a trifle has been given to one, if that child by misbehaviour deserved it (though it must be very gross indeed) the court will not vary it. Then it is also, *in such manner as she pleases*; so that upon an improvident match she might appoint it to the separate use of the daughter, exclusive of the husband, which shews it not to be vested; for the husband would take any interest vested in the wife. If the mother died without appointment, it would go equally amongst
 [60] them; the power being over, and it becoming certain and vested: if all three died before the mother, the representative of none would take; but it would sink into the testator's estate; being only for the daughter's benefit. But in this case it survives to those, who were alive at the mother's death; it not being vested subject to be divested but contingent; and if it could vest, it is joint, not in common.

(b) 1 Brown, 191, 298, where Lord *Loughborough* laid down the rule to be, that where the time is annexed not to the gift, but to the substance of the gift, there it lapses by the death of the legatee. In 1 Brown, 444, a legacy towards establishing a bishop in *America* was held not void, though none as yet appointed; the money was ordered to remain in court till the appointment. 1 Brown, 103. 2 Brown, 58. Post, 211.

(c) In Prec. Chan. 256, it is held, That where a mother has a power to divide an estate among her children, she must do it equally: 1 Co. 177. 1 Vern. 66, 355, 414. 2 Vern. 513. Cas. temp. Talb. 73. 2 Vol. 361, 640. Cowp. 651. Brown, 450.

Then thirdly, what must become of the £200 of which the mother made no appointment, and nothing vested at the father's death? It is insisted, that the mother's discretionary power is devolved on the court, which may appoint, as it pleases, and ought therefore to give the £200 to the plaintiff to make an equality: but there is no such devolution on the court (d): it is true, that powers have devolved on the court by non-acting, misbehaving, or death of trustees: as in the appointing maintenance; it being a necessary thing: so as to a legacy given under restraints of marriage, to prevent which the court has acted very largely. But this is a particular kind of parental discretion, with which the court has nothing to do: so that the true construction is, that since the mother is dead without executing the power as to this part, and there are two of the objects alive, it vests in them equally to be divided, and there is no ground for the court to prefer one; which is consistent with the construction of the former point. But if this power had devolved on the court, there would be no ground to give the plaintiff a preference; whose behaviour has not been commendable, and given the mother just cause of offence: although the court would not therefore exclude her entirely.

The second general question was, in whom the legacy of £300 in the will of *Robert* the son should vest: whether in the only child of *Sarah* alive at the making the will; or also in those since born or to be born?

LORD CHANCELLOR.

I doubted at first: but now think it was meant for the benefit of all the children *Sarah* should have; for the testator, knowing she had but one then, has yet given it to children, has appointed out survivors: and given it over to another branch of his family; which he could not mean, till all failed.

The third general question was as to the fund for the payment of this £300 legacy; personal assets not being admitted sufficient: in aid of which it was insisted, a leasehold estate held of the dean and chapter of *Durham* should be brought as equitable assets; for that though the testator on the renewal of the lease had inserted his brother *John* the defendant's name with his own, he was only a trustee; for [61] the testator alone paid the fine and rents, and received the profits.

To rebut which, the defendant proved, that the testator put in his brother's name, as his father did his; and intended, he should have the benefit of it, if he survived; which though but by one witness yet being uncontradicted and unimpeached, *Lord Chancellor* held, was sufficient evidence to rebut the resulting trust, and in support of the survivorship, the term being in point of law vested in them both; and all resulting trusts being liable to be rebutted by evidence of the testator's intent. So that this was not part of the assets of *Robert* the son.

Then the plaintiff insisted that the £1000 which *Robert* had power to charge on the real estate, should be assets, or a charge by the will for payment of the legacy.

Lord Chancellor was of opinion, that it should; for being a power

served by the absolute owner of the estate making a voluntary settlement on his brother, it should be construed liberally, being a reservation of part of the ownership: although it is different, where the power is over the estate of a stranger; and yet some of those have been construed liberally, to the prejudice of the remainder man. Then as to his execution of it, he has used the word *charge*, which is the word in the power; nor is there any occasion for his referring to the power, if he does it in substance: as in *Sir Edward Clere's* case in *Coke*: and it is only a shadow of a difference, that he has charged all his estate; whereas this was before settled to uses, for these powers to the owner are to be considered as part of the property: but this is most strictly so; the term being in trust for himself, which is the same as the legal estate; and this is stronger than the case of *Coventry v. Coventry*, where a power, though never executed, was held to charge the remainder man, on this same ground (1), being part of the ownership.

(1) See nevertheless, *Holmes v. Coghill*, 7 Ves. 499. 12 Ves. 206, and post, 5 vol. 1, &c.

MADDOX v. MADDOX, Dec. 5, 1747.

(Reg. Lib. 1747. B. fol. 575.)

Party having notice through his agent, of sufficient to make him inquire as to the title, cannot protect himself by procuring the legal estate. Attorney, &c. may object to answer as a witness as to confidential communications (1).

Notice to an agent, as well as personal notice, will affect the party, and the deposition of the agent will be allowed to be read.

EDWARD MADDOX suffered a recovery of an estate in *A.* descended to him in tail; and afterwards settled all his lands in *A.* upon his family: a tenement in *A.* of which he had the reversion after an estate for life, descended to him in tail by the death of the tenant for life; he suffers a recovery of it, and devises it to his younger son in fee, because the elder had disobliged him: he afterwards mortgages it, together with £200 that he had a power to charge on the settled estate, for the securing £200, which he borrowed; and dies.

[62] The mortgagee applies to the elder son for the money; who at first disputed the payment; but afterward submitted thereto, upon the mortgagee's assigning to him that tenement so charged, that he might stand in his place; to which the mortgagee agreed upon his covenanting to indemnify him from making this assignment; he having heard of the younger son's title. The eldest son mortgaged the tenement to *Betton*, who had advanced the money for the payment of the former mortgage.

The first question was, whether the plaintiff the younger son, had any title to this tenement; *Betton* insisting that the father had no right to devise it, being comprised within the settled estate.

Secondly, supposing he had; yet in equity there was no ground to take it away from him, who was a mortgagee for valuable consideration without notice of that title.

(1) See 2 Gwill. Bac. Ab. 579, 580. 4 T. R. 759, and 2 Ves. jun. 189.

LORD CHANCELLOR.

As to the first question; the plaintiff had a title subject to the father's mortgage, which was only so far a revocation of the will as to let in the mortgagee's security. The original settlement was only, of what was comprised in the recovery, which this tenement was not; the father not then having the freehold, nor intended so to be, as all the subsequent acts shew; viz. his suffering a recovery of it, devising and mortgaging it.

Then as to the second; *Belton* says true, that he had a good right to take the conveyance from one, who was heir at law and in possession; and having an assignment from the mortgagee; but it appears on all the circumstances, that he had notice of the plaintiff's title: for which it is not material whether it was personal or no, notice to his agent being sufficient (1). Here is such evidence of general notice, either to the party himself, or to his agent to take care, as made it necessary for him to inquire into the title; which he not having done, must take the consequence; the mortgagee swearing that *Belton's* agent was present at the execution of the assignment, when the indemnity was insisted upon; and the agent swearing that the deeds were laid before counsel, who made objections about the plaintiff's title. But if there was more doubt on the parol evidence, the assignment itself is strong evidence; for it has not the face of an assignment to a person having the equity of redemption; for it is subject to the equity of redemption, and was plainly meant to keep the mortgage on foot, if he had not, but some other person had, the equity of redemption; as the covenant to indemnify also supposed.

The reading of the agent's deposition was objected to. [63]

Lord Chancellor said, that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness; yet if he consents, the court will not refuse the reading his deposition. This objection has been often made; and though some particular judges have doubted, it is now always over-ruled (2).

(1) See *Le Neve v. Le Neve*, post, 64, and 2 vol. 370.

(2) This is not quite correct law; for a court will often stop such a witness. See 4 T. R. 759. 2 Ves. jun. 189. and Gwill. Bac. Ab. 2 vol. 579, 580.

BANKS v. DENSHIRE, Dec. 9, 1747.

(Reg. Lib. 1747. A. fol. 306.)

S. C. 3 Atk. 485. *quod vide*.—Copyholds unsurrendered by mistake, want of surrender supplied in favour of a younger child.

GEORGE DENSHIRE made his will thus: "I give all and every my freehold and copyhold messuages, lands, tenements and hereditaments, (having surrendered the copyhold part thereof to the use of my will) situate, lying and being in *L.* to *Banks* (1), and the heirs of his body, remainder over:

(1) Not so. The devise was to the plaintiff, his daughter (who married the plaintiff, *Banks*) and the heirs of her body.

and the said copyhold part thereof shall be subject to the payment of £400 mortgage, which is on part thereof."(2).

The testator had but two copyhold estates in *L.* one of which he had surrendered to the use of his will: the other not.

The question was, whether the defect of surrender of part of the copyhold should be supplied against the son and heir of the testator (3)? For whom it was argued, that it should not, from the intent of the testator to devise nothing but what was surrendered; although the court will supply it in several cases of younger children, if not contrary to the intent. In the case of the *King's Head Inn in Turnham Green* [3 *Atk.* 8. and *Allen v. Poulton*, post, 121.], which was a copyhold house, but three parts of it in one manor, and one in another manor: the testator there devised all his copyhold estate, which he had surrendered to the use of his will: having surrendered only that which was in the manor including the three parts; and the court held, that only should pass.

For plaintiff it was alleged, that there were several declarations by the testator, of his having surrendered all his copyhold to the use of his will: and therefore under a mistake which this court will supply.

LORD CHANCELLOR.

That is but a parol declaration; of which I cannot take notice; but I think, there are words sufficient to take in this copyhold estate; the description being as large as possible to take in the whole; and what is to confine it is in a parenthesis, and in nature of a recital; therefore not like words containing a description. This therefore differs from the case cited; which was determined by me with great reluctance; the
[64] relative pronoun *which* there making it restrictive. Suppose the testator had begun with the recital, that "whereas he had surrendered, &c." in which he had been mistaken; yet the words of the grant should have their full effect: but the latter words sufficiently shew his intent to give the whole; describing it as part of what he before devised, and shewing he meant to give more than the part subject to the mortgage: and he had no other copyhold except that in question; which therefore comes within the description; and the defect of surrender must be made good (4).

(2) And he directed, "that as well the said freehold as the said copyhold estate should be subject to an annuity of £50 to the defendant his son [and heir] for life." R. L.

(3) In favour of a younger child.

(4) It is to be observed, that a considerable alteration has been lately made in the law relative to copyholds, by the stat. 55 Geo. 3. ch. 192, which dispenses with the necessity of a surrender in respect of all testators dying after the passing of that act, upon payment by the persons intitled or claiming of all duties, fees, &c. that would have been due and payable in case a surrender had been made. It is also to be noticed, that it seems most advisable to surrender to the use of the will in every case where it can be done, notwithstanding the benefit of the act. See *Scriven on Copyholds*, 129. The act in question is inserted, *ibid.* p. 610.

LE NEVE v. LE NEVE, Dec. 9, 1747.

(Reg. Lib. 1747. B. fol. 109.)

S. C. 3 Atk. 646. Amb. 436.—Notice to an attorney of a prior conveyance unregistered will postpone a conveyance for the benefit of the principal which has been registered. Notice to agent is notice to a party.

If on marriage settlement an agent is employed on both sides, both will be affected by notice to him. Nor is it material on whose recommendation or advice he was employed.

Though the court will not decree against a distinct denial by answer of a fact charged and supported only by one witness; such denial must be positive, full, and complete.

Though the register act vests the legal estate according to the prior registry, yet it is left open to all equity: and notice even to an agent, of a prior purchase not registered will affect a subsequent purchase, though registered.

The court often gives credit to a party's answer, so as to make it the foundation of an inquiry.

EDWARD LE NEVE in 1718 married his first wife, who then had a considerable fortune; a freehold and personal estate, with more personal estate in expectancy. His father had a leasehold estate which by articles were covenanted in consideration of the marriage, and her personal estate, to be settled on trustees and their heirs for *Edward Le Neve* for life; then for his intended wife for life, for a jointure if she survived him: after their death, in trust for the issue of the body of *Edward* by her in such manner as he by deed in life, or by his will should appoint: in default of such issue, to *Edward* and his heirs.

The marriage was had, and a settlement made in pursuance of the articles; there was issue; the wife died: the only children now living were the present plaintiffs, a son and a daughter. In 1743 *Edward Le Neve* married a second wife; but previously entered into articles with her trustees, for settling this very estate on himself for life, then on her for her jointure, and on the issue of that marriage; pursuant to which a settlement was made.

This estate was subject to the *Stat. 7 Queen Anne, cap. 20.* which requires registry. The first marriage articles and settlement were never registered; the second were. *Edward Le Neve* also mortgaged this leasehold estate, as absolute owner.

The bill (1) was brought by the children of the first marriage, to have an execution of the trust of the leasehold estate settled thereby; and in order thereto to have the subsequent articles and settlement postponed, though registered: on the foundation of notice to the second wife, or her agent or trustee, of the first articles previous to her marriage, and the execution of the second articles; and to have the leasehold estate disincumbered of the mortgages made in prejudice of the trust: and that the plaintiffs may be let in according to the contingency.

Lord Chancellor, having taken time to consider of the case, now pronounced his decree. The first settlement of this leasehold estate is an odd one, for it is settled as a freehold estate: however that will not affect the question, as it will vest in a proper manner. The [65] plaintiffs admit the law to be against them from the defendant's

(1) Vide *ante*, 61. Such notice must, however, be in the same transaction. *Fitzgib. 207. 2 Atk. 242. 3 Atk. 294. 392. Barn. Ch. 220.*

registering; because the act gives the legal estate where the register has placed it, so that the general question is, whether there is sufficient equity for the plaintiffs to get the better of the legal estate vested in the defendant's trustee, who is a purchaser for valuable consideration? which will depend on the point of notice, and the consequences of it. To determine this, several questions have been considered: first, whether it sufficiently appears, that one *Norton* was agent or attorney for the second wife? Secondly, whether there is sufficient evidence of notice to him of the first articles; such as will be admitted according to the rules of this court? Thirdly, supposing there is sufficient evidence, whether in equity it will affect the defendant's purchase, and oblige the court to postpone the second articles and settlement to the first; notwithstanding the registry act. [7 Ann. c. 20.]

The first question will depend upon the answer of the defendant the second wife; who in general has denied notice of the first articles and settlement; but says, that *Norton* was not employed for her, but as an attorney for her intended husband; admitting that, he might prepare the articles, she having a confidence in him from her husband's recommendation. So that her general denial must be taken with this admission; which leaves it open to the proof of notice to her agent, although personal notice is denied. It is said, that notice to her husband's attorney or agent will not affect her; but she has sufficiently admitted, that he was agent or attorney for her, by her consenting to his preparing the articles, from a confidence in her husband. So that no matter what ground she went upon, or on whose recommendation or advice; it being the same to the plaintiffs: for it would be very inconvenient and mischievous to take into consideration the recommendation, from whence an agency arose; nor is it material, that the husband also employed him; there being several cases where in marriage settlements the same counsel or attorney are employed on both sides, who would be both affected with notice to him; it being the same to a person having an equity. There are two very strong cases for this; as *Brotherton v. Hatt*, 2 Vern. 574, where the agent, whose notice affected the party, was employed on both sides, as I take it, and which is very clear authority: next *Jennings v. Moor*, 2 Vern. 609 (2), where the subsequent approbation of an agent affected the party with notice; though that was going much farther than is necessary to go in the present case. These cases clearly prove it to be not material to the plaintiffs, upon whose recommendation or advice *Norton* was employed, or that he was employed by both; it being good notice to her, that he was employed by her.

[66] As to the second question: it is objected for the defendant, that notice being denied by her answer, and proved by one witness, it is contrary to the rules of the court to admit it; which is generally true: but that admits of this distinction; where the defendant's answer is a clear denial of a fact, which is proved only by one witness, the court will not decree against the answer. But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to herself, whereas in other respects it will equally affect her,

(2) S. C. acc. Bro. P. C. 278. (oct. ed.) under title "*Blenkarne v. Jennens*." See *Maddox v. Maddox*, ante, 62. post, 2 Vol. 370. *Merry v. Abney*, 1 Ch. Ca. 38. *Sheldon v. Cox*, Amb. 624.

there are several cases, where the court on one undoubted witness will decree against that answer (1): then here she denies only personal notice: which is a negative pregnant, that still there may be notice to her agent, and is a fact equally material. Then *Norton* swears, that a copy of the first article was delivered to him previous to the second, to take counsel's opinion, and that he might have verbal notice before: which is very strong; and the copy was delivered, to see, if they could get the better of this very settlement. So that this is such an evidence of notice, as to be admitted here.

The last question depends on two things: first, whether any notice whatsoever would be sufficient to take away from the defendant a purchaser for valuable consideration, the benefit of the act? Secondly, whether notice to the agent would do so?

The first is of great consequence and extent. The intent of the preamble of the act was to secure subsequent purchasers and mortgagees, against prior secret conveyances, and fraudulent incumbrances; for the last of which there was no occasion to provide. The first means, that a subsequent purchaser having registered, should prevail against a prior secret conveyance, of which he had no notice: but if he had notice of a prior conveyance, for valuable consideration, which was vested properly, that is not a secret conveyance; the act does not say, that a subsequent purchaser shall be affected with no equity whatsoever; therefore, though its manifest operation is to vest the legal estate according to the prior registry; yet it is left open to all equity; for there is no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance. This act therefore is properly compared to 27 *H. cap.* 16. of inrolments or bargains and sales; being much to the same effect, though not in the same words. The meaning of this act was, because before, when uses were in being, any agreement passed the use to the bargainee from the bargainor; which occasioned great mischief; being prejudicial to the crown, intangling purchasers, and overturning the common law as the solemnity of livery: to prevent which it enacted inrolment. But the rule thereon ever since is, that an inrolment by a subsequent bargainee having notice of a prior bargain for valuable consideration, whether by actual agreement to pass immediately or by articles, is not material: for he is equally affected with that notice, [67] as if his conveyance was by feoffment, or lease and release.

So that the operation of equity on both those acts is the same, and is reasonable; for it were strange, that a conveyance in such a form should exclude any equity; which would give an opportunity to take advantage of having the legal estate to commit fraud: and to this purpose the cases put for the plaintiffs are material. As suppose a purchaser employs an attorney, takes a conveyance, and pays the money and orders the attorney to register; which he neglects, but purchases it himself and registers it, that would be a ground for relief: so if it had not been his attorney, but one who prevailed with him not to register: or if it was done by one, who was privy to the first transaction, and knew it was not registered. These cases clearly shew, there may be relief against the force of those words, which gave a prior right to the prior registry: which brings it to the con-

(1) See 1 Vern. 136. 161. Post, 97. 2 Atk. 19. 140. 9 Ves. 275. 12 Ves. 278, &c.

sideration of the cases on this head; which are but three. The first is, *Lord Forbes v. Denniston*, [4 Bro. P. C. 189, octavo edit. and S. C. 13 Vin. Ab. 550. and 19 Vin. Ab. 514.] which not being rightly understood, shall be mentioned particularly. It arose in *Ireland*, where a general register Act, 6 *Queen Anne* (1), *Lord Granard* was seized of a large estate, of which he was only a tenant for life by marriage settlement, remainder to his first and every other son in tail, with power to make leases for three lives, or twenty-one years in possession: in 1715, there were tenants, who surrendered and took a new lease from him for three lives at £30 per ann. but it was not registered: he becoming indebted came to an agreement with his first son *Lord Forbes*, who thereby took upon himself to pay his father's debts, and to pay an annuity to him, and another to his wife; in consideration of which the father conveyed his estate for life to trustees for *Lord Forbes*, but *Lord Forbes* had no personal transaction in this, the whole being done by one *Stewart*; who during the treaty had notice of a lease made, and got the last conveyance registered, which the lease was not. The trustees brought an ejectment to recover the estate from the lessees; who brought a bill for relief in the *Chancery* there, before *Lord Chancellor Middleton*; who at first made a declaration, rather than a decree, that the conveyance to the trustees was prepared to destroy the lease, which was not registered; and was therefore fraudulent against the tenants, though done without the intention of the father or son; and recommended it to have the lease established; if not he would give judgment. The parties not agreeing, he decreed it fraudulent, though *Stewart* alone had notice, and decreed a perpetual injunction against the ejectment. Upon appeal to the Lords here, it was fully considered; and they made a decree 23d *February*, 1722, which requires explanation: for it is commonly cited as if the judgment were affirmed; whereas it was reversed; not because the *Lord Chancellor* there went on a wrong principle; but because he made a wrong decree upon that principle; for thereby the lease would be good, though not warranted [68] by the father's power. The Lords therefore reduced it to what was right; giving the tenants full relief against the defect of the registry; quieting the possession during the father's life; and granting an injunction against the judgment in ejectment: but after the father's death left it open to dispute the lease, if not made in pursuance of the power; for after death of the father, who was only tenant for life, the register act was out of the case. The second is the case of *Blades v. Blades* (2), *May* 2, 1727, by *Lord King*; which is a very material authority. A will not being registered, the heir at law gets into possession, and mortgages to one who registers; and so having the legal estate, and being a purchaser for valuable consideration, insisted that the devisee had no equity, to take from him the benefit of the registry act. But the mortgage was declared fraudulent and set aside, on the foot of the mortgagee's having had notice of the will's not being registered; yet it does not appear in the bill or answers, that there was any charge of actual fraud; the only charge being notice. The third case happening on the registry act is, *Chival*

(1) There is a material difference between the Registers Act for *Ireland* and those in *England*. By the Irish act, 6 *Ann.* c. 2 an absolute priority is expressly given to the instrument first registered. Vide Sch. & Lef. Rep. 98. Et *ibid.* 159, 160.—The registry of a deed in *Ireland* is not, of itself, notice, *ibid.* 90. 157.

(2) 1 *Eq. Ca. Ab.* 358. pl. 2.

v. *Niccols & Hall* (1), in the *Exchequer*, December 10, 1725, which is a clear authority for relief against the registry act, on the circumstance of notice: but it is not material to state it, because there was a charge of fraudulent circumstances in the party claiming the benefit of the act; and therefore so far not applicable to the present case. The two other cases went on notice only, and the first on notice to the agent; for the *Lord Chancellor* excused the father and son from notice of the contrivance. The ground, on which all the cases went, was that taking the real estate after notice of a prior right for valuable consideration was a fraud, and took away the *bona fides* of the second purchaser, making it *mala fides*; which is agreeable to the definition of fraud in the *civil law*. *Digest, lib. 4. tit. 3. et fraus nemini patrocinari debet* (2).

This being so on notice in general: the next consideration under this head is, whether notice to the attorney or agent is sufficient; which is a consequence of the former decision. It must be admitted, that some notice would be sufficient, as actual personal notice; and such as in the cases put for the plaintiff; and fraud in the party being the foundation, it is the same whether in the party himself, or the person employed. These articles were put into *Norton's* hands, to see if they could get the better of them, and circumvent the issue by the first marriage; to which it is objected for the defendant, that here may be a fraud upon her; for admitting *Norton* knew of this, it might be done by collusion with the husband to cheat her; which indeed may be true, and has happened in several cases; but ought not the person who trusted and employed him, at whose-soever recommendation, to suffer by this fraud, rather than a stranger? The rule is, that he, who trusts most, must suffer most. This imposition happened in the two cases in *Vern.* and that of *Lord Forbes*: and yet they were affected with notice; and otherwise it would overturn several cases determined on notice to agents, and make it very [69] precarious; for agents do frequently use imposition. But this case is stronger; for *Norton* was not only her agent in the transaction, but her trustee; and there are several cases, where notice to a trustee, who is not barely nominal, being privy to the transaction and accepting the trust, will affect the party: so it will here, and take from the defendant the benefit of the register act.

Then the question is, what decree should be made? It is objected, that the plaintiff's interest under the articles is merely contingent: and it is true, that without issue, it will go to the father, at whose death the will or deed appointing must be known. Yet the plaintiffs are intitled to come here for relief: for a contingent interest is such, as the court will take care for the benefit of the party when it happens.

Decreed that *Norton* having full notice of the first marriage articles and settlement, the second should be postponed thereto; and the trustees in the second to convey and assign the leasehold estate accordingly, at the expense of the defendant the father: but as to the other defendants the mortgagees, no notice of the first articles being proved on them, the plaintiffs have no right, but on redeeming them for what is due for principal, interest and costs. But the plaintiffs have a clear right to have the leasehold estate disincumbered against these mortgages by the father; and as

the court has in several instances given credit to an answer, so as to make it the foundation of an inquiry, let the master inquire what portion or provision the father gave his daughter upon her marriage; for it would be hard to direct a disincumbrance as to her, who had already received a portion. The father to pay costs hitherto; and had not the plaintiffs examined *Norton* as a witness, they should have costs against him.

Note. The case of *Irons v. Kidwel*, October 29, 1728, was cited by the *Attorney General*; where the bill was to set aside a purchase by the defendant, subsequent to the plaintiff's title, which was not registered, whereas the defendant's was: and it was there insisted, that the registry act should not avail the defendant, because he had notice; which notice was only that a bill was filed in *Chancery*, and that *lis pendens* should affect the defendant: but Lord King, though he allowed the general rule of notice, thought it not such a notice as should take away the defendant's benefit of the statute; for that what did affect the party's conscience, would not be a ground for equity to relieve.

[70]

SPERLING v. TOLL, Dec. 11, 1747.

(Reg. Lib. 1747. B. fol. 121.)

At the Rolls, Sir William Fortescue.

Money to be laid out in land considered as land. Executory trust for three for their lives, as tenants in common; if any died without issue living at their deaths, their shares to go to survivors; with contingent remainders in tail; and remainders over. Two of them dying in testatrix's life-time, held their shares *lapsed*, and went over.

DOROTHY CARD, having a power under the will of her husband to dispose of a real estate, in pursuance thereof devised it with the residue of her personal estate to trustees to turn it all into money, then to lay it out in the purchase of land; one moiety thereof to the use of her brother *William* for life: then subject to an annuity of £50 to his wife; to his three sons during their respective lives, without impeachment of waste, as tenants in common and not as joint tenants; but so that if any of these three shall die without issue, living at the time of their death, that part or share shall go to the survivors; with power to lease and make a jointure: then to trustees to preserve the contingent estates during their lives; which were, after their respective deaths, to the use of their first and every other son of their respective bodies lawfully begotten, severally and successively in remainder, according to priority; and in default of such issue, to the use of the daughters; in default of them, to the use of 10 grandchildren of her husband's sister, their heirs and assigns, equally to be divided share and share alike, as tenants in common, not as joint-tenants.

Two of the nephews of the testatrix, and also three of the ten devisees over, died in life of the testatrix, the surviving nephew left a son.

For that son it was insisted, that he should take the whole three parts of the nephews as tenant in tail; this not being a devise of a mere legal estate in land, but an executory trust, and like the case of money articulated to be laid out in land; on which the court will put a different construc-

tion, and take larger strides to attain the intent, than on a devise of land : which intent here was, that nothing should go to the devisees over till a failure of issue of all the nephews.

Against this it was said, that the son should take only one third, his father's share ; and that the other two shares should go over. This is not a mere devise of personal estate ; the question depends on this, whether cross remainders are limited by this will : and if not whether the court will direct the settlement, as if they were. They certainly are not so limited : and although where there are only two objects, cross remainders may arise by intent and implication : yet it is not so, where there are three or more, notwithstanding the plainest intent ; [70] from the inconvenience that would follow. *Gilbert v. Witty, Cr. J. 655.*

Master of the Rolls.

This must certainly be taken as real estate : the fund itself coming out of a real estate directed to be sold. It is a general rule, even in the disposition of real estate, that there is a great difference where it is executory and where immediate ; there being several cases, where the court has taken a greater latitude in the execution of the former ; where it is executory the court will often direct it in strict settlement, where the party would have taken an estate-tail, if it had been an immediate devise ; this is undoubtedly executory. It is said, the intent was, that while there was issue of the three nephews, it should not go over ; and that being executory, it should be so directed. The court will always go as far as possible to support the intent, but that intent must appear from the words of the will. There are few cases, where evidence of the intent will be allowed out of the words : it only will where there is a doubt to whom the residue is given, or for ascertaining the nature of the legacy or person of the legatee. If then the court is so very cautious where there is evidence to prove the intent, much more ought it to be so, where that evidence arises only from the surmise of counsel or of the party ; the court is to carry the will into execution : not to make one for the party, or to give that construction which the court should think most proper. If this matter was laid before the testatrix, she might think it reasonable, that it should not go over, while there was issue ; and it might be very proper ; but that does not appear from the words ; rather the contrary. The plain construction carries it after the death of each respectively ; and not to give a survivorship on the death of one without issue ; for it is given in common, and survivorship was in the contemplation of the testatrix, as appears from her directing a survivorship for life ; and having omitted it in the direction of the inheritance, it is reasonable to suppose, she did not intend it. There is no occasion therefore to have recourse to the case cited that the court will not give cross remainders by implication ; because it does not appear from the words of the will. So that only one third goes to the son, the other two to the remainders over, there being no issue female.

Another question was made ; whether the shares of the three devisees over, who died in the life of the testatrix, were so vested as to be transmissible to their representatives, or should lapse ?

Master of the Rolls said, it was hardly to be called a question ; for it certainly was not transmissible. It must be looked upon in the na-

ture of land, and though it was personal estate, it would lapse; being given in common, had it been given jointly it would survive.

ATTORNEY-GENERAL v. SMART, *March 4, 1747-8.*

Where a decree for the establishment of a charity should be made, an information will not be dismissed because it prays wrong relief; but the court of Chancery will not act in many cases; and has no jurisdiction in many others, as foundation under a charter, &c.

(1)

AN information was brought to have the increasing surplus profits of a charity school, founded by the crown, applied for the benefit of the master; but the master was not a party thereto. There was a cross bill to have them applied for the benefit of the poor children.

LORD CHANCELLOR.

It is very unfortunate, that these causes, called charity causes, are more often reduced to the single question of costs than any other. This is a very causeless information, and should be dismissed without any decree, if it was not for the cross bill. The doctrine is true in general, that where there is an information, it ought not to be dismissed, but there should be a decree to establish the charity according to the intent of the donor: but that rule relates to private charities; for where there is a foundation for a perpetual charity by the crown, it is established as well as it can be already, by a higher authority than this court. This is a foundation by the crown; and there is a particular direction by the last charter, for the application of the revenue: nor will I make a decree for the establishment of a charity, which is properly regulated by charter from the crown. The information is plainly brought for the benefit of the master; and had it stood on that only, it must have been dismissed, or ordered to stand over to make him a party. According to the case of *Thetford School*, 8 Co. 136, if the whole revenue had been applied for the master, it might be a ground to apply the increasing surplus, in the same manner, agreeable to the intent; but there has been great alteration here; as a doubt whether the whole body was not dissolved for not taking the oaths, and so a new charter granted by the crown (who had a right to visit) and accepted by the corporation, appointing a very ample salary to the master; in contradiction to which, this information would exhaust the whole for the master's benefit, and take it from the poor boys. This then being an unnecessary information, and in contradiction to the right (k), the relators must pay the costs thereof. Nothing should be more discouraged than the

(k) On this account there must be always a relator, therefore, if they all die or there is but one, and he dies, a new relator must be inserted, before there can be any further proceedings. Ch. Pleas, 42. 2 Ves. 330.

(1) See *Attorney-General v. Parker*, ante, 43. *Attorney-General v. Talbot*, post, 78. *Attorney-General v. Scott*, post, 418. *Attorney-General v. Middleton*, post, 2d. Vol. 327, 8. *Attorney-General v. Whiteley*, 11 Ves. 241, 247. *Attorney-General v. Jackson*, ibid. 365, 367, 372. *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305, 315, &c. *Attorney-General v. Earl Clarendon*, 17 Ves. 491, and the case of *Birkhamstead School*, 2 Ves. & Bea. 134.

bringing informations colourably for the benefit of a charity, but contrary to the real charity (2).

(2) The late act for the regulation of charities is the 52d Geo. 3. ch. 101.

STEPHENS v. TRUEMAN, *March 5, 1747-8.* [73]

(Reg. Lib. 1747. B. fol. 257.)

On marriage of a daughter there is an agreement that the father shall in present pay for her separate use £500 to which she was not intitled unless she survived him; and that a real estate, which came to her from her mother, should be settled after the uses of the marriage to the father and his heirs; the right heir of the father intitled to a specific performance of these articles.

In marriage articles and settlements, on good and valuable considerations, such considerations will run through all the limitations in favour of the remotest remainder-man. Costs paid to disinherited heir raising a fair question (1).

A woman intitled to £500 (l) if she survived her father, and to a moiety of a real estate (m); the other moiety belonging to her sister, after whose death it might come to her (both coming on the part of her mother) going to marry a husband who could make no provision for her; the father agrees thereto, and in consideration of natural love and affection, agrees to give her this £500 in present for her separate use; the other part of the agreement was, that the real estate of the daughter, whether in possession, or such as should any way come during the coverture should be settled to uses, viz. to herself for life; then to all her issue by that or any other husband; then to her sister and her issue; then to the father and his heirs.

This bill was brought by the heir of the father, for a specific performance of the agreement; and for the plaintiff were cited the cases of *Osgood v. Strode*, 2 P. Wms. 245, and *Vernon v. Vernon*, 2 P. Wms. 695, (2), and *Fagg v. Nash*, October 22, 1744 (n), where Sir Robert Fagg was seised of an estate in fee, and on the marriage of a son, they covenanted to settle it to the uses of the marriage, remainder to the third daughter of Sir Robert, who, on the determination of the precedent estates, brought a bill for performance against the heirs at law: and the question was, whether a court of equity would settle it upon her, who was a mere volunteer? Your lordship there held, that every party had a right to have it carried into execution; from which a volunteer should not be cut off. The same reason holds for carrying into execution, a settlement on a child by a father; the court extending its power in cases of agreement to things not in fee; the hastening the payment of the £500 was a consideration, and the court does not weigh considerations of this kind to see whether they are adequate or not.

For defendant. It was settled in *Fursacre v. Robinson*, Chan. Prec. 475, that the court will not compel a specific performance of a voluntary conveyance. No decree has been made on the foundation of a voluntary interest; none of the cases cited went on the ground of disputing that rule,

(l) Atk. 186.

(m) Wils. 356.

(n) Reported in 3 Atk. 186, by the name of *Gering and Nash*.

(1) Affirmed in Dom. Proc. See 1 Bro. P. C. 267. oct. edit.

(2) The court ordered the heir to be paid his costs.

which governed a court of equity, but that the cases were not within the rule, and it would be unreasonable to carry it to the plaintiff, who is a relation of the half blood to the daughter.

LORD CHANCELLOR.

[74] When the rules of the court and the nature and intent of these articles are considered, this is a strong case for the plaintiff, that a conveyance should be to the plaintiff in fee as right heir of the father. The old rule was, and is now generally (although of late not so strictly adhered to) that none can come here for a specific performance, who does not come under the consideration of the agreement [see 3 *Atk.* 188, 9, 90. *Mr. Sanders'* edition]; as that it shall not be for the benefit of collateral branches in marriage articles; but as agreements are entire, and the several branches might have been in view, the court has in latter cases laid hold of any circumstances to distinguish them out of it, still preserving the rule in general. If therefore there was any kind of consideration, the court would lay hold of it to support it, as in *Osgood v. Strode*: there the limitation to the issue of the marriage was expired; but because the father had some interest in the estate settled, part moving from him, and it might be presumed, that he stipulated for the collateral branches, they were held within the consideration. The court has got out of it in another way, as in *Vernon v. Vernon*, because an action might be brought in the name of the trustees; though there clearly the persons claiming were not within the consideration. Then to consider the nature of the present case; the father must be taken, not to be obliged to pay the £500 in which the daughter had only a contingency; so that if she died in the life of the father, her representative would not be entitled thereto; then the father's paying it was a consideration for any benefit the daughter might give him in the articles. The intent of the wife, as well as the other parties, was to settle whatever she might be intitled to, out of the power of her husband; which would give her great power over her property, and over him; so that he should not obliged her to settle it as he pleased; and for the precarious and remote interest limited to the father, the advancing £500 by him was a sufficient consideration, although not mentioned for a consideration, but natural love and affection only; for the whole must be taken entire, and one part to influence the other. This therefore is to be distinguished from all the cases, where it was voluntary: nor was it unreasonable to limit it to the father, rather than the collateral relations of the mother, who were more remote than the heirs on the part of the father; to whom it might be intended to go; and to whom it would be very difficult to have the reversion go by limiting it in any other manner than to the father and his heirs, which was the true way. Then to consider this on the reason of *Vernon v. Vernon*, an action would lie here in the name of the trustees, with whom the daughter covenanted for herself and her heirs, against the mother, if I should not decree a specific performance; which I believe, I also mentioned as an ingredient in the case of *Fugg v. Nash*, where an action might be brought. The description here intended to take in the whole, so that there must be a conveyance to the plaintiff in fee.

But no costs; for the defendant, being a disinherited heir, might well have the opinion of the court.

THE CORPORATION OF CLERGYMENS SONS v. SWAINSON,
March 5, 1747-8.

Payment of interest for a legacy by an executor from time to time shall be evidence of assets, not so of a single instance of payment of interest.

Doctor *Grandorge* by his will gave £500 to the corporation, to be by them applied for the benefit of the daughters of the poor *clergy* as they shall think fit; but by a codicil directs that £500 be placed out by his executors immediately after his decease, in government or land securities at interest, to be paid to five poor old women for twenty-one years, if they or any of them so long lived, making *A.* and *B.* his executors; who exhibit no inventory or account, but pay the interest during their lives; and the husband of *B.* after her death, continues to pay her proportion.

Both executors being dead, the plaintiffs brought a bill, as legatees following assets for payment, and insisted that a minute account should not now be taken; but that the acts of the executors were as sufficient evidence of assets come to their hands, as a formal admission would be.

For defendants it was insisted, that the representative of *B.* and not of her husband, should be brought before the court to be charged; and that, though the court has followed the assets into the hands of strangers for legatees or creditors; yet the court has not taken it to be an entire admission of assets, but only for so much.

LORD CHANCELLOR.

This is a particular case, and such as it is incumbent on the court to assist the plaintiffs if possible; and not put them to the taking a strict account of the assets of the testator, as there cannot now be a personal examination of the executors. By the alteration of the codicil, the corporation had no right to demand this legacy till after the death of five persons or twenty-one years; the question is as to the fund, out of which it shall come. The court has often gone upon this, that after length of time the acts of an executor shall be considered as evidence of assets come to his hands; especially if interest had been paid from time to time; for the executor must be presumed to know what he did, although a single instance of payment of interest for a legacy by an executor will never be considered as a proof of assets. What other ground could there be for continuing these payments, if the principal had not come to their hands? There is no one having a right to the effects of *B.* but her husband who survived her; his representative therefore is sufficient without requiring the representative of the wife to be brought before the court; should I order that, they must go into the ecclesiastical court, and to what end? It not appearing that the wife had any separate estate. As to what is said of an admission only for so much; this is the case of a husband, who possessing all the assets of his wife, might have applied them for his own use; and a *devastavit* would have lain for a wasting by him or his wife. He had the whole power over the assets, whilst her right to the administration continued, and it is admitted, that he continued the payment of the interest after her death. There is a sufficient evidence then of assets come to the hands of the executors, to answer the

legacy between them. Let the question of the proportion be between themselves; nor shall they put these poor people to a minute account after this length of time, and after such acts by them, and no inventory taken. Nothing is more necessary than to keep executors to deliver inventories.

POLE v. POLE, *March 8, 1747-8.*

(Reg. Lib. 1746. B. fol. 305.)

Resulting trust.—A father having provided for his eldest son, but not for the rest, takes a security for the proceeds of an estate sold in the name of himself and eldest son. Held a trust for the father's personal representatives (1).

A FATHER upon his son's marriage gives him a considerable advancement: and having several younger children besides, who had no provision he sells an estate; but £500 only of the purchase money being paid, he, took security for the remainder in the name of himself and his son. The father received the interest and great part of the principal without any opposition from the son; as did his executrix after his death; the son writing receipts for the interest.

A question was now made, whether the son should be considered as trustee for his father, or interested in his own right?

LORD CHANCELLOR.

No doubt where a father takes an estate in the name of his son, it is to be considered as an advancement, but that is liable to be rebutted by subsequent acts;* so if the estate be taken jointly, so as the son may be intitled by survivorship; that is weaker than the former case, and still depends on the circumstances. The son knew here, that his name was used in the mortgage deed, and must have known, whether it was for his own interest, or only as trustee for the father, and instead of making any claim, his acts are very strong evidence of the latter; nor is there any colour why the father should make him any farther advancement, when he had so many children unprovided for: and in using the son's name, the father might have a view that his son should be a trustee rather than another.

* See 2 Atk. 480.

(1) *Maddison v. Andrew*, ante, 60, 61. *Stileman v. Ashdown*, 2 Atk. 477, 479, 480, and notes to Mr. Sanders' ed.; and see *Scroop v. Scroop*, 1 Ch. Ca. 27.

HILL v. BALLARD, *March 9, 1747-8.*

(Reg. Lib. 1747. A. fol. 292.)

On the marriage of *A.* his sister advances him £600 to make a present to his wife, and *A.* procures his father to give her a bond for the amount payable at a month after his death. *A.* pays his sister interest during his father's life time, and for the month afterwards. On a bill by the sister against the representatives of her father and her brother; held a debt on the estate of the father, not to be indemnified by *A.* and the plaintiff was also decreed her costs out of her father's estate. *Aliter*, if such a transaction had been between strangers. Accounts, memoranda, &c. of the father read in favour of his representatives, although objected to by the other defendant as likely to affect him. How answer of one defendant may affect another defendant. As to securities, &c. in fraud of marriage agreements (1).

A son applied to his father to advance him a sum of money upon his marriage, to enable him to make a present to his wife; which the father refused; but put it into the method of the sister's advancing the money to her brother; the father giving an obligation as a collateral security.

The father's estate thereby becoming liable, the question now was, whether he meant only to be a surety for his son, and consequently to be indemnified, as it was argued, he should; the son having paid the interest during the father's life, and a month afterward; which was said to be strong evidence of the son's debt, not the father's.

The reading of the father's papers, books, and memorandums, was objected to. But *Lord Chancellor* allowed it; questions of this kind, whether the advancing or paying a sum of money by a father was intended as a bounty to a child, being hardly to be cleared up any other way; and there are several cases, where evidence may be read against one defendant, such as an admission in his answer, which in all its consequences, if taken to be true throughout, would affect another defendant; and therefore the court would take it to be true only in part.

The evidence being read, *Lord Chancellor* said, though it was not absolutely clear, he thought, there was enough to make a determination upon. It was clearly proved that the obligation was given for a sum of money advanced by the sister to her brother; but it importing only a surety, if the case was between strangers, the father would be indemnified. But the material part of the case is, that this is between a father and a son: had the father, instead of advancing money, taken security from the son, to make him debtor for it, it would be a fraud upon the marriage; which this court always discountenances; like the case where security is given by the son to refund part of the portion to the father: between strangers also the son's paying the interest would be evidence of his debt; but the father's intent was not to take any part of the burthen during his life, therefore the son undertook to pay it during the father's life; so that it was intended as part of the necessary advancement of the son on his marriage: therefore to be considered a debt on the father's estate.

But no costs were decreed against his representative (2); it [78] not being unreasonable to have the opinion of the court upon such a dark account.

(1) Vide post, 86, and 2 Vol. 375.

(2) The reporter was mistaken, see note (3), p. 77.

ATTORNEY-GENERAL v. TALBOT, *March 21, 1747-8.*

(Reg. Lib. 1747. A. fol. 620.)

S. C. 3 *Atk.* 662.—Chancery has no jurisdiction to interfere with the election of members of colleges, or misapplication of their funds, &c. where the appointment of a general visitor can be inferred. Plea that the Chancellor of the University was visitor of Clare Hall to the whole relief and discovery of such an information, supported. No precise words to constitute a general visitor.

Information lies not here, as on a general charity, to call colleges to account as to election of members or application of the profits.

No particular form of words to make a visitor.

New ingrafted fellows of a college subject to the visitor's jurisdiction and the same powers as the old foundation.

THE foundress of *Clare Hall College* in Cambridge, appointed the Chancellor to visit: *et si quid repererit corrigendum*, to amend it; and to determine doubts, and to construe the statutes; excluding her heir therefrom.

By the will of one *Freeman*, £2000 was directed to be laid out in lands, for the relief of ten poor scholars, two of whom to be fellows of *Clare Hall*. The executors being trustees of the legacy agree with the college for it: and follow the will of the donor as to the qualifications, which ought to be observed.

The information praying that the relators should be admitted fellows; the defendant put in a plea thereto: and the general question was, whether by this plea it was sufficiently shewn to the court, that there is a general visitor? which had two subordinate questions. Whether here is a general visitor of the college? And whether that general visitor extends to the private foundation by *Freeman*?

LORD CHANCELLOR.

I have received satisfaction enough to determine on this plea at present; because it will not be final on the merits; and certainly as it is of the first impression, it is of great consequence. If a determination should be made, that colleges should be still liable to an account with regard to the election of members, or application or misapplication of profits; it would open a door to a great deal more of vexation. This is the first case of the kind I have known.

As to the first question: upon what is set forth, I think there is a general visitor on the old foundation. Instead of the general words creating a visitor, the founder has split them too much, in directing what to do; which is the occasion of most of the questions in colleges, about visitors (*q*). There is no particular form of words requisite to make a visitor; but it must be construed on the whole from the intent of the founder: but here it is to visit; to which it is consequential, that he shall have power to receive appeals, and all other acts of visitorial power, and in the general creation of it extends to all kinds of rights, from the words *si* [79] *quid*, &c. and the visitor might amove a fellow and let in another having a right: which as he might do on the annual visitation, he might do on appeal: and the excluding the heir shews a strong intent, that he should be a general visitor, not to a particular purpose. There-

fore on the several statutes set forth in the plea together, the Chancellor is visitor. The powers are absolute and final; and cannot be taken away by the courts of law in this kingdom. Such also is the intent; and notwithstanding what has been said, it is the most convenient jurisdiction; for though perhaps it may be sometimes absurd, yet it is less expensive than a suit in law or equity; and in general has been exercised in a reasonable manner.

As to the second question, I think it does extend to the two fellowships founded by *Freeman*. It is said there is nothing in the will expressing or implying, that they should be part of the ancient body: but I think otherwise from the words in the will, that it meant two fellows, according to the nature of that foundation and institution. It is truly said to be a question of great consequence; for if it should be allowed, that these original grafted fellows should not be under the same powers, it would create great confusion. It is said, that this being a corporation could not extend itself, and that therefore this agreement cannot make them part of the college; but I must take them as members: had the number been limited, they could not have added thereto; but here it was indefinite, and the corporation might add in a reasonable manner; and they will be subject to the same powers. And though the agreement be a private contract with the trustees, it is such an act of the college, as the visitor had a right to take notice of: so that as to the question, whether the college did right in refusing the relators, the visitor is a more proper judge than a court of law or equity; because he can better enter into their qualifications. It will be open to the relators, who may counterplead the facts set forth in the plea: but I must take it to be otherwise now from the prayer of the information; against which I also hold, as it prays an account; for the college may have innocently erred in construing the statutes. But why do the plaintiffs come here? why not bring a *mandamus*? the information, not being for the establishment of a charity, would take away the jurisdiction of common law: and though it is said, *boni judicis est ampliare jurisdictionem*, yet I am against enlarging the jurisdiction of this court to cases arising in colleges on this foundation; which would cause more controversy.

The plea shall be allowed: it being still open at the hearing the cause.

ATTORNEY-GENERAL v. WYELIFFE, Jan. 26, 1747-8. [80]

(Reg. Lib. 1747. A. fol. 363.)

Nomination of a master to a charity school not subject to the general rules of lapse, as in cases of presentation to livings.

ON the foundation of a charity school the wardens of
were by the statutes to nominate a master within sixty days after an avoidance: upon their default the dean and chapter of York within thirty days were to do it: then it devolved to the bishop.

The wardens nominated the defendant *Romney*; who not being then in priest's orders, as the statutes required, the bishop taking it to be a lapse, sent notice to the chapter; who not making the nomination, the

bishop after the expiration of the thirty days nominated Mr. *Craddock*, who afterwards made a resignation of his office into the hands of the wardens of the school, and every other person having power and interest to accept it. They in five days afterward again nominated *Romney*, then being in priest's orders.

To which nomination, several objections were taken on the part of the relators.

LORD CHANCELLOR.

In these cases where no person has made out a title, the court having a power to regulate charities, often gives direction to proceed to a new election, according to the statutes. It depends here upon the right of the defendant *Romney*, which if good, is an answer to the relief prayed; and I am of opinion, that on the last nomination he has a good title to be master.

The only objection to his first nomination, the not being in priest's orders, though but a slight objection at this time, yet on the construction of the statutes cannot be dispensed with by the court. I should doubt indeed, whether to be in priest's orders should be strictly taken according to the canon law, or agreeable to common parlance; if it turned on that alone: but the subsequent statutes shew, that such orders were meant, as capacitated the person to celebrate mass; which is a decisive construction on the words of the former statute, and binds me down; for since the reformation a charitable foundation for saying mass, or praying for the souls, &c. is adjudged to be performed by saying the service according to the liturgy. 1 *Instit.* 95. b.

But the second nomination is valid. The first objection thereto is, that the wardens could not nominate him this second time, as upon [81] the first avoidance, because the sixty days given by the founder were expired, and there was a devolution to the bishop: to which it was answered, that this is like a lapse; of which if the bishop does not take advantage, he is bound to accept of the presentation of the patron; though not so in the case of the crown. But I think this is not like a lapse; for a person in the second instance is as much a patron for that time as in the first: therefore not within the reason of a lapse; which is that the cure of souls may not be neglected.

The second objection is, whether it is good on the resignation of *Craddock*; and I think it is.

An objection to the wardens' right to present, is taken from the want of sufficient notice to the chapter; though I think the bishop was misled in the giving notice, and should, if properly advised, have gone further, and sent them also a copy of the statutes; yet he was not strictly bound thereto in point of law; for he was to presume, that they knew of the statutes as well as he. Notice is to be given of the facts; but not of the foundation of right, which they were to inquire into: as upon notice of an avoidance, the patron is to look into all the consequences of it.

The next objection is, that the bishop's turn was never really served: and this has been compared to the case of a presentation to a living and to a lapse, that where the presentee of the king dies before induction, or the presentee of a common person before institution, they shall present again; which is true, because it is by the same original act; but the an-

alogy of those cases, is not to be carried to cases where there are not the like requisites: and *Craddock's* being in actual possession is not material; for he might maintain an ejectment for the lands, if any, and recover them; which shews he was master.

Objected that he was not master, because he had not taken the oath: but the statutes import, that he was first to take the office, being only directory, [and not a condition precedent as to the oath. The remedy for his not taking it is, that the wardens may turn him out; nor is it in this respect to be compared to the officers of corporations; all the charters being different from this. Then the resigning is strong evidence of his accepting the office. The proceeding to a new nomination was regular, and within sixty days; and what weighs with me is, that the resignation was to quiet the matter; and for this further reason it is not like a presentation, because the bishop could not revoke it; which the king before induction, or a common person before institution might do.

The relator then having made no right, which the defendant has, and no objection to his character; it must be dismissed with costs.

OWEN v. DAVIES, *Feb. 1, 1747-8.*

[82]

(Reg. Lib. 1747. B. fol. 151.)

Specific performance of an agreement decreed against one who afterwards became a lunatic (1).

THE bill was for a specific performance of an agreement with one, since become a lunatic, for sale of a reversion upon an estate for life.

LORD CHANCELLOR.

From the opening of the cause I doubted, whether under the circumstances attending the defendant I should decree a performance; but upon the equitable circumstances of the case I must. It is certain, that the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a court of equity ought to decree a performance; and the act of God should not change the right of the parties; but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law.

Another part of the case, which made me doubt, was the manner agreed on among themselves for the disposal of the purchase money; which I shall not establish, but shall decree the money to be taken care of for the benefit of the lunatic. But on the first part there is no imputation by any of the defendants as to the value of the contract and the consideration; which is agreed to be reasonable, and delivers the court from a great difficulty. The question then arises, upon what terms it is to be performed; whether interest is to be paid, and from what time?

Generally on an agreement for purchase of an estate in possession, the court never gives interest for the purchase money, but from the time of

(1) See *Pegge v. Skynner*, 1 Cox. Ch. Ca. 23.

the purchaser's coming into possession, where he takes possession before the conveyance is executed, and has the profits: but here he has not the profits, only the reversion. It is true, it is hard to say, the reversion shall be sold several years after, and so much nearer possession, for the same price, without any compensation when the plaintiff had an absolute title in equity to the estate, and a right to call on the trustees for a conveyance: but that will depend on the subsequent agreement of the parties by an instrument in writing, which appears to be reasonable, that the residue of the purchase money, above what was already paid, should bear interest at 4 *per cent.* but the instrument not being signed by the plaintiff or his agent, though signed by the other parties, it is argued, that he is not bound thereby; but I think he is. There are several agreements [83] binding the parties in this court, though not signed by them; as where any thing in particular has been done thereon: here part of the purchase money has been paid: it is the agreement of all, though signed only by some, and the plaintiff made no objection to this instrument before the bill, nor particularly by the bill: then several receipts having been given for part of the purchase-money; if the agent for the lunatic has accepted of the money in part of the principal, when interest was due, without applying it in discharge of the interest, the court must do it for him.

If therefore the plaintiff will have a specific performance, it must be on such a proper application of the money, and payment of interest from the time of that instrument. No costs on either side.

HILL v. ALLEN, Feb. 3, 1747-8.

(Reg. Lib. 1747. A. fol. 263.)

The court will not relieve against a master's legal right to all the earnings of his apprentice who quitted his service before his time (1).

THE bill was by an apprentice, who against his master's consent had quitted his service of a shipwright, before his time was out, and gone on board a privateer, which took a very considerable prize; whose share thereof the master claimed.

LORD CHANCELLOR.

In general the master is intitled to all that the apprentice shall earn; consequently if he runs away and goes to a different business, the master is intitled at law to all his earnings: yet if a case comes before me in equity, where the master, instead of instructing him in the particular business his parents intended, encouraged and seduced him to go to sea, and to a different course of life, I should incline to relieve the apprentice against the master's legal right; otherwise it would destroy the faith of the contracts between the parents and the master; but that is not the present case; for it appears that the master took all reasonable methods to prevent this; and is clear of any imputation. Indeed that roving dispo-

(1) See *Meriton v. Hornsby*, ante, 48.

sition in the apprentice, were it not in contradiction to his contract with the master, is not to be blamed; being in some sort useful to the public. Then as to the bond, given by the boy's mother, with £30 penalty to indemnify him for any loss he should sustain by his quitting his service; if it appeared to be a stated agreement for damages, it might be another point: but at the time of giving the bond they were told all his prize money would belong to his master; so there is nothing in equity to relieve. I will send it to be tried therefore in an action at law, as I did in another case, unless they compound it; but, I think, the balance should be in the boy's favour.

The share being £1200, the master accepted £450.

No costs as between them; but the costs of the managers to be deducted out of the plaintiff's share.

[84]

DAVIES v. BAILEY, Feb. 8, 1747-8.

(Reg. Lib. 1747. A. fol. 266.)

Where in a will a wife not included in the word *relations* according to the statute of distribution (1).

THE testator, having made an absolute bequest to his wife of a watch and other things given her by any of her relations, and the use of the family pictures for life, gives all the rest and residue of his personal estate to trustees, to place it at interest, and permit the wife to receive the interest to her use during her natural life, and after her decease then the said residue, and all securities thereof, to such of his relations as would be intitled thereto by the laws in force of distribution, to be divided as the said laws direct. By another clause he directed, that whoever commenced a suit against the wife or trustees during her life, should have no part of the real or personal estate; but that their part should go among such other of his relations, as the statute of distribution should appoint, to be equally divided share and share alike.

The general question was, whether the widow was intitled, not only to the whole surplus of the personal estate for life, but also to a moiety thereof absolutely.

LORD CHANCELLOR.

The question depends on the clause of the bequest of the residue, and on the intent of the testator from the whole frame of the will: the intent is plain; the only consideration being, whether the testator has used proper words to express it. Here is first an express estate for life; which is not to be enlarged by subsequent implication; for that it must be very plain. *Relation* is a very general word, and takes in any kind of connection; but the most common use of it is to express some sort of kindred either by blood or affinity; though properly by blood. The testator certainly does not use it in the general sense, nor in the vulgar sense; because he refers it to the statute of distribution; which has nothing to do with affinity, but blood only. Then does it take in the wife? It cannot

(1) *Garrick v. Lord Camden*, S. P. 14 Ves. 372.

he said there is no relation between husband and wife; but the question is, whether it be such relation, as is here meant? he mentioned the statute of distribution; it certainly means relations included in the statute by *next of kin*, which words are in both the clauses thereof used in opposition to a wife, *kindred* meaning of the same family and kind with the intestate. But this is not decisive in the present case; it must receive the same construction from the other part, where he gives it after the decease of the wife, and puts her out of the case. It were absurd to suppose, he meant the wife's executors to take with his relations; but it rests not

[85] here: the whole frame must be considered; which was to give the wife a present maintenance, and ausufructuary interest; and his vesting the whole in trustees shews, he did not intend the absolute property of the moiety in the wife; the creating the trust being merely to preserve the interest to those, who were to take after her death: otherwise he would have given her this moiety absolutely before creation of the trust; and were the other construction to prevail, the family pictures would after her death be divided among her executors as well as the relations: in the latter clause he certainly meant other relations besides the wife; otherwise according to the statute the wife should have one moiety, and the rest be shared. The intent therefore was, that the wife should have the whole for life only: the other construction would be strained, and contrary thereto.

MILLER v. FAURE, *Feb. 10, 1747-8.*

(Reg. Lib. 1747. B. fol. 254.)

Bequest of a contingent interest in personally void, where the preceding gift never vested, owing to a lapse.

THOMAS JENNINGS devised the surplus of his personal estate to his brother and his heirs; and in default of issue at his death, then to be equally divided between his two sisters or their heirs. The brother died in the life of the testator leaving a son.

It was insisted, that, as the brother's representative could not take, it should go over to the sisters.

But *Lord Chancellor* held, that the contingency, upon which they were to take, never happened: and it was the same as if it had been upon a stranger's death, to whom nothing had been given before, who died in the testator's life leaving issue. Therefore it must be considered as an undisposed part, and go according to the statute of distribution.

MILLAR v. TURNER, *Hilary Term, Feb. 11, 1747-8.*

(Reg. Lib. 1747. B. fol. 532.)

A posthumous child within a provision in marriage articles for such children of the marriage, as should be living at the death of the father or mother (1).

In marriage articles it was recited, that the grandfather had given a bond for £2000, to be raised for such child or children of the marriage, as

(1) See *Freemantle v. Freemantle*, 1 Cox, Ca. Ch. 248. Rol. Abr. 43. tit. Graunt, D. 11. Also *Gordon v. Gordon*, 1 Meriv. 141. and *Earle v. Wilson*, 17 Ves. 528.

should be living at the death of the father or mother : in default of children, to executors of husband.

The question was, whether a child born after the death of the father should be within this provision, and have a share with the rest.

LORD CHANCELLOR.

[86]

There are many cases, where a posthumous (s) child is considered as *in esse* (t), as to take by devise (u), to be vouched in warranty. There was a distinction, that where the estate vested by purchase, an infant born after should never divest it; according to the maxim of the common law, that an estate by purchase must vest *eo instanti*, that the last estate determines. But in *Reve v. Long*, the House of Lords thought this hard; and therefore an act of parliament was made with a retrospect to allow such devise; which was an unusual thing to do for a particular case. A bill has been brought in favour of such infant to stay waste, and an injunction granted (x): the destruction of him is murder; which shews the laws consider such infant as a living creature: in all cases relating to his advantage he must be considered as *in esse*, according to the rule of the civil law; so on the statute of distribution he shall be considered as living; the intention being to provide for all the children; and if that be so, the same reasoning will hold in a marriage-settlement, where the intention was to provide for all the children of the marriage. This case differs from *Musgrave v. Parry*, 2 Vern. 710; for the testator there might have the relations, he knew, only in view; as he might have had a particular kindness for them: but on a marriage agreement, where a provision is making for the issue of that marriage, it is impossible they should intend to exclude any child on the accident of his not being born till after his father's death.

Suppose in this case a bill had been brought in the life of the grandfather, to compel him to give such a bond; should it not have been directed to be divided among all the children, whether born before or after the father's death? and the construction must be the same now, as it would have been in life of the grandfather: and I found myself a good deal on this; for suppose before the statute 10 & 11 W. 3. (y), which established a contingent remainder to a child not *in esse*, if there had been articles to settle, and a posthumous son not mentioned; yet the court would have carried it on. This case too is stronger, as there is no other provision for the children of the marriage, it is to be construed liberally: otherwise, if there was no other but this one child, he should take nothing.

(s) Post. 156. (t) Post. 114. 1 P. Wms. 486. 245. (u) 1 Inst. 390. (x) 3 Inst. 50. (y) 2 Ves. 230.

TROUGHTON v. TROUGHTON, Feb. 25, 1747-8.

(Reg. Lib. 1747. B. fol. 352.)

S. C. 3 Atk. 656. *quod vide*.—Settled estate disencumbered of a charge in fraud of a marriage agreement (1).

Mortgagee may tack to his mortgage a bond by mortgagor against his heir at law; not against purchaser for valuable consideration.

Purchaser discovering an incumbrance may retain so much of the money, remaining in his hands, as will answer it.

A SETTLEMENT is made by a father upon the marriage of his son, with a covenant that it shall be free from any incumbrance; in consideration of which, the son covenants (2) to reconvey part of the estate after the father's death, or to pay £300 to such person as the father shall appoint.

[87] The father created an incumbrance of £300 by mortgage: and afterwards appoints £300 to his daughter, and dies.

The son brings a bill to have the estate disencumbered of that mortgage; and also to have a bond of the father's to the mortgagees delivered up, and discharged out of the assets of the father.

LORD CHANCELLOR.

The plaintiff has a plain equity to have the estate disencumbered of the mortgage brought on it, in fraud of the marriage agreement.

As to the bond; where the mortgagor of an estate, either before or after the mortgage, contracts another debt with the mortgagee, for which he gives a bond, and dies, and the equity of redemption descends to the heir at law (z), a court of equity will permit the mortgagee to tack the bond to the mortgage: because otherwise it would cause an unnecessary circuit, and the heir at law is debtor for both (a), but where the person claiming the equity of redemption is as a purchaser for valuable consideration, there is no right to tack the bond to the mortgage: because the estate is not liable to the bond debt. Though the plaintiff is intitled to be indemnified as against the father, for what he is bound to pay by the father's bond yet he is intitled only out of the father's assets.

Then the question is, how far this £300, charged on the estate disjunctively, is liable to indemnify the plaintiff? He is intitled to be reimbursed out of this £300 and interest, if the father's estate is not sufficient. The son's covenant was part of the consideration moving from him for the settlement made on him by the father; in fraud of which was the incumbrance made; and the question is, whether any person claiming from the father shall take back this estate of £300 out of it, without letting the son, who is a purchaser, have the benefit of the same agreement? which

(s) 1 Vern. 244. 245. 2 Ch. Rep. 23, 164. 1 P. Wms. 775. 3 Atk. 556.

(a) Prec. Chan. 89. 2 Eq. Ca. Ab. 594. 2 Str. 1107. 1 P. Wms. 775.

(1) See *Daubeny v. Cockburn*, 1 Meriv. Rep. 626.

(2) This statement is not correct. It appears from Reg. Lib. and is so stated in Atkyns, that the obligation to re-convey part of the estate, or pay £300, &c. was by a separate instrument, executed on the same day as the settlement; being a joint bond from the husband and wife. See the case as reported in 3 Atk. 656, with those cited in the argument, and the decree, &c.

would be contrary to the rule of all agreements, that they must be performed on both sides. But it is said, that this differs, because the intent was to provide for the sister of the plaintiff by this £300, who stands equally in the light of a purchaser for valuable consideration as the plaintiff; and that therefore, although the father has broke the covenant, yet this shall not be taken from the daughter, who must be put on the same foot as children, from whence nothing can be taken; but resort must be had to the assets of the person making the settlement; and that is true; but here the daughter was only in a secondary light; it being for the father's benefit, who might direct it to be paid to a stranger; by whom it could not then be claimed by voluntary appointment from the father, letting this incumbrance remain. It is like the case of a purchaser discovering an incumbrance, who shall retain so much for it, as remains in his hands; and this £300 being part of the consideration of the settlement, is in the same light. If it was intended for the daughter, it would have been put so: for she was in the power of the father: and there is no other way of making the father to have acted fairly, but by considering this mortgage as an appointment of so much: the father's assets must be first applied, and if not sufficient to satisfy both the bond and mortgage, the plaintiff is intitled to retain out of the £300, the remainder whereof to go to the appointee. [88]

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SHISH v. FOSTER, & *é* con. Feb. 26, 1747-8.

(Reg. Lib. 1747. B. fol. 241.)

Conveyance of an estate to which defendant is intitled in equity, suspended till an account of the rest of the estate taken in the original suit, from the danger of the plaintiff's losing his demand.

The rule that he who will have equity must do it, holds not so as to tack together things independent, but the court will lay hold of any circumstance for it, as danger from absconding or living abroad.

THE bill was to set aside a stated account and release, obtained from the plaintiff on his coming of age, by the defendant his guardian, and executor to his father, without delivering an inventory, or laying vouchers before him. It was admitted that there were false recitals, and several errors therein; and a general account was directed.

The cross bill was brought for a copyhold estate, to which the defendant *Foster* was intitled by agreement with the plaintiff's father for £800, though it was not surrendered.

The question was, whether it should be immediately taken out of the hands of the plaintiff, or not till after the account taken; as it was insisted for the plaintiff that it should not, because both parties being obliged to come into a court of equity, those who will have it, must do equity; and it was equal equity that the defendant should make satisfaction for any part of the estate come to his hands, as that the plaintiff should convey the estate come to him.

LORD CHANCELLOR.

That rule does not hold throughout: so as to tack things together which

are independent in their own nature; but wherever the court can do it, they will lay hold of any circumstance for it: and here there is danger of the plaintiff's losing his demand, if the estate should be taken from him, the defendant having frequently absconded; which makes it very like the case of *Jacobson v. Hans Towns* (or merchants of *Almaign*) of part of whose estate the plaintiff *Jacobson* and his family had been lessees, and negotiated it for them. They brought an ejectment to recover, when the leasehold estate was expired. *Jacobson* objected, that he was a creditor in a long account for negotiating, &c. and brought a bill, that they should not take the estate from him, till he received satisfaction for his demand; and an injunction was granted by Lord *Macclesfield*, and continued by Lord *King*: not that he had any real lien on the estate; but from the difficulty of his getting satisfaction if this estate was taken from him, as they were a corporation residing beyond sea: therefore they were restrained from recovering. The same reason weighs here as there; and the conveyance must be suspended till the account is taken: nor should *Foster* have a specific performance of the agreement, till he has accounted for the rest of the estate.

TILBURGH v. BARBUT, *March 2, 1747-8.*

S. C. 3 Atk. 617 (2).—Devise to one and his heirs; and if he died without heirs, remainder to his half brother; the devise being of a clear fee, the remainder void.

A MAN devised to his son and his heirs: and if he died without heirs, remainder over to another, who was half brother to the first devisee.

A question was made, whether the first limitation was in fee, or in tail so as to let in the remainder? and it was insisted, that the doctrine, which excluded the half-blood from inheriting, was without any ground.

Lord Chancellor allowed that: but said, this was a plain case (c), and one of those points which the court will not suffer to be argued, as being determined before. [see *Tyte v. Willis*, Talb. 1.]: that he believed in all the cases, where a fee is mounted on a fee, the testator intended it should go over but did not use proper words; and that he must construe it *heirs* generally, unless there were some words in the will to restrain it to *issue*; nor could he go on the presumption, that the testator did not know the law: this was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother. The bill was therefore dismissed.

(c) 1 Brown, 147. Eq. Ab. 305. 1 P. Wms. 70. 1 P. Wms. 23. where a devise by a father to a second son and his heirs for ever, and for want of such heirs, then to testator's right heirs was held an estate tail; secus if the devise had been to a stranger. Vide Douglas 251, where *heirs* not being restrained by any subsequent words, a fee was held to pass; secus if there had been restraining words subsequent, as in Cowper 234, 410.

(2) See Mr. Sanders' note on this case.

MENDES v. MENDES, *March 11, 1747-8.*

(Reg. Lib. 1747. B. fol. 200.)

S. C. 3 Atk. 619.—Sons by a reasonable construction of their father's will, entitled to their legacies intended as portions (1) or an advancement for them, at 21, though the words did not warrant it.

Survivorship as between the children referred to their not attaining 21, or marriage, though no express words to that effect; there being a preceding clause as to other children, where the like words were used.

A direction in a will that the wife should have the education, may amount to devise of the guardianship.

The guardianship of daughters determined by marriage, not so of sons (2).

ALVARO MENDES, *May 8, 1728*, made his will in this manner; "I give £8000 to one daughter, and £5000 to another; and if either or both die before marriage or 28, the legacy with the increase or interest shall go equally to and among my two sons *M. and J.* and I direct, that my wife shall have the education and maintenance of my children; and all the rest equally share and share alike; and *in case of the death of either of them*, and residue of my estate both real and personal, I give to my said two sons *the whole residue to the survivor*: if both die without leaving lawful issue, then half to my wife, and the other half to my two daughters equally, and their issue; and for want of such issue, to the survivor: and if all my four children die without leaving issue, then to be divided among collateral relations." There was a *memorandum* in the conclusion, desiring £600 *per ann.* should be allowed to his wife, for the children's maintenance, £100 for each girl, £200 for each boy; and in case of the death [90] of any of the children, the inheritor or inheritors are to pay their shares or proportions, so that the said £600 *per ann.* should not be deficient.

The sons having attained twenty-one, brought a bill to have their portions paid to them, not subject to any contingency.

It was admitted there was no real estate.

LORD CHANCELLOR.

This is a very incautious will, and it is difficult to find such a construction, as upon all the parts of it will satisfy one's mind: but this foundation must be gone upon; that it is a will by a father making provision for his wife and children; in which he must be presumed, unless there are express words to the contrary, to make such a one, as would answer an advancement and portion: otherwise it were to suppose him to act unnaturally. In order thereto, if the words will bear it, such a construction must be made, as will enable them thereby to provide for a wife and children; otherwise it would not answer a paternal disposition. In this view to consider the will, the first difficulty arises on the clause disposing of the residue to the sons; and on the death of either to the survivor; what is the meaning of those words, and the contingency there described? The sons were then extremely young; it is admitted on both sides, that those words must receive a reasonable construction, and be restrained to a death under particular circumstances; because he knew by the course of nature they must die, and

(1) See *Hawes v. Hawes*, ante, 13, and *Stones v. Heurly*, post, 165.

(2) Vide Post, 160, in *Roach v. Garvan*.

might live long and have children : in which case he could not intend it. It is contended for the plaintiffs, that the true construction is, that they are tied up to a death without issue in the life of the testator ; but that could not be meant ; because in all the provisions of the will, where he used those words, he means after his own death, and after his will takes place ; as is plain, where he gives the portions to the daughters respectively, &c. of which there could be no increase or interest till after his death. Another construction insisted on for the plaintiffs is, that it should be confined to a death without issue before twenty-one, then to be vested, divided, and paid : to which it is objected, that although that would be a reasonable construction, yet there are not words to warrant it, but upon the whole that is the true construction ; for the testator, wherever he uses those words, means a death of the children before such time as they should want their portions : this construction arises also, where he directs the maintenance ; being a declaration of his

[91] will, that the wife should have the education of the children ; which I think, might amount to a devise of the guardianship, (though it is not necessary to determine that), and then it would be clearly till they arrive at twenty-one. But it must receive the same construction, although it should not amount to a devise of the guardianship. It is true, a guardianship in *socage* determines at the age of fourteen, but here are no *socage* lands ; therefore it will import a guardianship till twenty-one. Then the disposition of the will must be altered, and the *memorandum* inserted here, where he directs the maintenance ; for it is not a codicil or distinct instrument, but one entire instrument, and would have been interlined, had there been room ; the meaning of it was to keep up the fund £600 *per ann.* entire, although some of the children should die during their minority. The inheritors, who were to make it up, mean those who took the shares as survivors of those dying ; the death of any children there is clearly before twenty-one ; the effect then, that this will have on the next clause relating to the residue is, that it must be construed in the same sense as he has used just before ; which will also answer all the intent of the father. In this clause of maintenance, I take in the marriage of the daughters ; which would determine the guardianship of them, though not of the sons : as was adjudged in the case of Lord Shaftesbury : but there are besides, the words *without leaving lawful issue* ; and death there in every part must be confined to a death before twenty-one, in the case of the sons ; or before marriage in the case of daughters. These words explain also the former death without issue : so that if they had married before twenty-one, and had lawful issue, the portion should not go over. All the contingencies then being out of the cause, and the sons having attained twenty-one, they are entitled to their portions : the other construction would be harsh, and hinder them from making any provision for a wife ; and therefore it is very happy that that memorandum was added.

BENSON v. DEAN AND CHAPTER OF YORK, [*Feb.* 29], 1747-8.

(Reg. Lib. 1747. A. fol. 854.)

Construction upon 28 C. 2. c. 8. for perpetuating augmentations of poor vicarages.

A QUESTION arose upon the construction of the statute 29 C. 2. c. 8. made for perpetuating the augmentation of poor vicarages, and upon the facts, how far they enabled the plaintiff to avail himself of that construction, so as to be intitled to the benefit of such augmentation, which was in this case reserved in general words: and it was proved that it had been constantly paid from 1661 to 1743, to the vicar of this parish.

LORD CHANCELLOR.

[92]

By the vacancies happening in the church preferments, upon the great alteration of the constitution by the sequestration and sale of them, there were great estates and incomes likely to arise to the persons who should then fill those incumbencies: it was therefore not to be wondered at, if a division was sought after: but the coming of these great fines to the present possessors was not the only reason for the augmentation; not extending to the succession, which would still be confined to the reserved rents; but there was another reason; because the inheritance of these estates were greatly improved by being purchased by private persons, as particularly a great one by *Chief Justice St. John*. It was therefore proper, they should be under obligation to apply it to augment poor vicarages. That produced the *King's* letter, upon which the act was afterwards made; the construction whereof is to be considered.

In this church it is to be presumed, and in several others, that such reservation was made upon the leases, then granted by way of augmentation, as was most natural to give it to poor vicarages impropriate. It was originally the regular clergy that plundered the church, although by the dissolution of monasteries it came into the hands of the laity. Upon the nature of this reservation, the terms of the act, and the fact of constant payment. I think, there was an appropriation for the augmentation of the vicarage in question. The act supposes the reservation might be made differently; in some appropriated, in others not; it intended to establish some of these reservations, where the reservation was made not to the vicars or curates; as the recital of the preamble shews. The question then is, whether this appears to be intended to be reserved for the benefit of the vicar or curate, though not reserved to him; the act intending to take in not only cases of express reservation, but also of intent; and here that constant regular payment for so long a time, is the strongest evidence possible, that it was so intended. Another clause in the act appears to be intended, for some cases, where there had been a general reservation and an agreement for application of part for the augmentation of some poor vicarages; within which clause this seems a case intended to be brought; and such usage of payment is the strongest evidence of such agreement. Another clause is material, viz. That if a question should arise concerning the validity of such grants, such favourable construction shall be made for the benefit of the vicar, as

has been made in commissions for charitable uses, which, I think, is the same as I have made here. I know but one case upon this act, in 3 *Lev.* 82. which I mention for the particular manner of declaration, and such as I never saw, (*quam penes se habet*) which the court allowed of [93] there. The dean and chapter might be tempted to take these augmentations to their own livings; I do not say they have done it, but it would be inconvenient to leave them such a power, and safer to pin them down: upon the whole, the plaintiff and his successors are entitled to the benefit of this augmentation; and it is not in the power of this body to disappropriate it, and give it to any other.

The rule, upon which the commissioners for poor vicarages upon the statute of *Queen Anne* have gone, in judging what is a poor living, is to value only the certain tithes the vicar was intitled to, not the uncertain; such as in towns where it depended on his good behaviour.

REVEL v. WATKINSON, June 11, 1748.

Tenant for life must keep down the interest of incumbrances although the whole of the rents and profits are exhausted by it (1). The court, however, will direct a reasonable maintenance for him out of the profits, if otherwise unprovided for.

ROBERT REVEL devises his estate in trust out of the rents and profits to raise by leasing, mortgage, or sale, enough to pay what his personal estate should be deficient to pay; and subject thereto in trust for his only daughter, in strict settlement, remainder in strict settlement to his brother; remainder over.

The estate devised to the daughter was not sufficient to keep down the interest during the life of the mother, who had a jointure upon the estate by a prior settlement; although upon her jointure's falling in, it was more than sufficient. But the mother living two years, an arrear of interest accrued.

The daughter married the defendant *Pegge*, and died without issue. The brother of the testator brought this bill to have £400 which had been paid by the trustee to the defendant *Pegge* applied in payment of the debts.

LORD CHANCELLOR.

Two things are very plain. First, that originally, and according to the nature of this trust and course of this court, the plaintiff has a right to have this £400 so applied; but secondly, it is as plain on the part of the defendant, that though the whole estate is liable in respect of creditors; yet, as between tenant for life, and him in reversion, the tenant for life is only obliged to keep down the interest; for the court will not construe it so as to exhaust the profits during his life, without something particular. The word *leasing* makes no difference; *mortgage* or *sale* coming after: and wherever those words are inserted, there is no instance of the court obliging a tenant for life to do more than keep down the interest, [94] unless there are particular directions, that all the profits should be applied. The reason of the determination in *Ivy v. Gilbert*. 2

(1) *S. P. Tracy v. Lady Hereford*, 2 Bro. C. C. 123.

P. Wms. 13. was, that although the words *rents* and *profits*, used generally, without more, imply a power to sell (2); yet the testator had there explained and restrained it by the subsequent word *leasing*; but no doubt was made, that if the words *mortgage* or *sale* were added, the inheritance should have borne the burthen.

The next question, though new in *specie*, is also clear: whether here being comprised in the trust an estate in possession, and also in reversion (upon the death of the jointress) which, when it fell into possession, would be liable to the same trust, the tenant for life is bound to keep down the interest only as the profits came into possession, from year to year; or whether the whole profits, as far as they will go, during the estate for life, should be so applied to answer the deficiency in the mother's life?

Secondly, taking it either way, whether the daughter was entitled to any allowance of maintenance during the mother's life?

As to the first: I am of opinion, that the whole profits during the continuance of the estate for life, should be applied to keep down the interest during that estate. It is only by construction in equity, that tenant for life should pay only the interest; as otherwise the creditor would come upon him for the principal. If there is tenant for life, remainder for life, and during the first estate for life, the whole profits are not sufficient to answer the interest of the debts, so that there is an arrear; I agree to what is said for the defendant, that it shall be a charge upon the inheritance, when it is by the same settlement: tenant for life being then only obliged to keep down the interest incurred during his own life; but that is not the present case; for here the mother's estate for life was by another settlement; during whose life the profits of the estate in possession were not sufficient to keep down the interest, but afterward more than sufficient. That surplus being an accruer to the trust estate must be applied to answer the former deficiency: and the trust must be considered as entire during the daughters estate for life. Any other construction would create inconvenience and confusion; for these trust estates partly in reversion and partly in possession, are very frequent; and if tenant for life, upon estates dropping in, should receive the profits from the fines, and let out at a rack-rent, without applying the profits to the arrears incurred before, there would be a great arrear upon the remainder man. Nay, were the estate accidentally improved, it ought to be so applied; or if a loss happened by tenants, the profits coming in afterward should be so applied.

But then the daughter must be allowed a maintenance out of [95] this trust estate during the mother's life; for she stands entirely in the light of a child unprovided for during that time, and at the mother's pleasure: and the court will not, in favour of a remainder man, suffer all the surplus profits to be exhausted to discharge the interest in exoneration of the estate, and leave a daughter and heir at law to starve: for which I can cite a stronger case; that of *Butler of Woodhall* before Lord *Hardcourt*, where, though it was in the case of a nephew, and all the profits of the estate devised subject to the trust of payment of debts, yet the court held the uncle could not intend his nephew should starve: and directed a reasonable maintenance should be paid him out of the profits: it appearing

(2) The reporter seems inaccurate here. See the report in *Ivy v. Gilbert*. Mr. Cox's note to *Trafford v. Ashton*, 1 P. W. 418, &c.

the creditors were safe or submitting to it. Then surely the court will do it for a child, and when the distribution of it is in the power of the court; and a legacy to a child payable at a future day shall carry interest, where it would not in the case of another person: and upon this foot must the account be taken.

ARNOT v. BISCOE, June 13, 1748.

(Reg. Lib. 1747. A. fol. 528.)

Attorney on sale of an estate not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vender. Though one witness cannot sustain a suit against a distinct denial by answer, the latter must be precise and positive (1).

Decree against the right of a person practising a fraud, though he was an infant, and could not have been bound by a matter of contract.

One witness not sufficient if denied positively by answer, unless corroborated by circumstances.

THE defendant *Biscoe* acted as an agent for the other defendant *Stephens*; who wanting money, proposed to the plaintiff the sale of a leasehold estate; the plaintiff entered into articles for it, paying £500 in part, for which sum he took a bond from *Stephens*; but before the execution of the conveyance, the plaintiff discovered that it was incumbered with a mortgage, on which there had been a decree of foreclosure in *Chancery*.

Whereupon he brought a bill against *Biscoe* for the £500 in default of *Stephens*; charging that *Biscoe* did not disclose the incumbrance, but declared the title to be in every respect good, for which the only witness was the plaintiff's son; and it was denied by the answer of *Biscoe*.

LORD CHANCELLOR.

There are two considerations in this case; First, the general equity, upon which the plaintiff has brought his bill; which is not in *specie* a common equity. Secondly, the question of the fact; whether there is sufficient evidence against the defendant to enable the court to make a decree against him, upon this principle of equity that in transacting a purchase or bargain, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is intitled to [96] satisfaction here? Which is the general principle, and is carried to a particular instance; where done by any person who is attorney or agent, not only of the buyer but seller.

The general rule is true with regard to all persons having interest in the estate (e); and also with regard to the attorney, agent, or solicitor of the buyer; having a trust and duty with his principal; and is liable to make satisfaction, if participant in the transaction; as was partly the

(e) In 1 P. Wms. 393, where a first mortgagee is witness to a second mortgagee, this shall postpone him, though no proof of his knowledge of the contents of the second mortgage, but in 1 Brown, 357, Lord *Thurlow* disapproves of this decree, as a witness is not privy to the contents of the deed. 2. Atk. 49.

(1) Vide ante, 66, and note.

case of one *Cant*, who was employed on both sides; which often happens in purchases, although more frequently in mortgages. And if the attorney or vendor of an estate, knowing of incumbrances thereon, treats for his client in the sale thereof without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce the buyer to trust his money upon it, a remedy lies against him in a court of equity; to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor. I distinguish greatly between this and not disclosing the general circumstances of his client, with the knowledge of which he is trusted, of which it would be improper to give notice; but otherwise when dealing for the purchase of an estate. This principle is not to be doubted in the case of vendor himself, or of a person who had interest, knowing of the transaction or purchase; which was the foundation of the decree by Lord *Cowper*, where the mortgage was made of an estate tail without suffering a recovery: the person who was issue or remainder in tail, was clerk to the attorney, and ingrossed the conveyance, without disclosing his title, though knowing of it. Upon a bill for foreclosure, when he insisted upon his title, the mortgage was made effectual against him, on this circumstance of privity; which was held fraudulent, without any other particular fraud; although at the time of the fraud he was a minor about twenty, of such an age as that his contract would not affect him. Then the connexion between an attorney and his client cannot be a stronger excuse for him, than the issue or remainder man in tail had in that case; it would otherwise be dangerous, if the attorney of vendor should not disclose such incumbrances; which is not disclosing secrets, or the circumstances of his client but what the purchaser has a right to know. This therefore is a good equity for the plaintiff against *Biscoe* in default of the other defendant, if it comes out so.

The next consideration is, whether there is sufficient proof to bring this within such equity.

But first, some objections must be taken notice of; that here the £500 was not advanced by the plaintiff on the credit or security of the estate; that therefore if the incumbrance was disclosed at the time of the conveyance, not of the articles; it is sufficient; which is true in some degree; but in general it is fair and right, that it should be disclosed at [97] the time of the articles; for then the plaintiff might not have proceeded in his purchase; but taking it to be at the time of the execution of the articles, it must be where they are executed entirely; not where partly at the time of the articles, and part of the money then advanced; for then it was as just, that the plaintiff should know of the incumbrance, as it would be in general at the execution of the conveyance.

But it is objected further, that the plaintiff took a bond; but that was for farther security: if a mortgage was made of this lease-hold estate, a bond would be taken; so that the taking the bond does not differ it.

As to the material fact of equity, though there is but a single witness for the plaintiff, and that to be taken with the connection between father and son, it is evidence here; though not by another law. But if this single evidence is denied by the answer, there is not sufficient to decree upon, and the bill must be dismissed, which is the rule; but the answer is not *ad idem*, the charge being positive, and the answer only to belief; which is

not sufficient to contradict what is positively sworn; nor could he be convicted of perjury thereon. [1 *Brown*, 52. 2 *Atk.* 15. 9 *Atk.* 407, 649. *Ante*, 66. *Post*, 125. 1 *Vern.* 161.]

On the fact, upon which I doubt, I think the evidence not clear enough to make a decree; but will send it to law to be tried on two issues: First whether *Biscoe*, or any person concerned for him in the purchase, gave notice to the plaintiff of this incumbrance (1). Secondly, whether at or before the execution of the articles and bond, or either of them, the plaintiff, or any person for him, was informed thereof?

(1) "Or of the decree of foreclosure, which has been made in this court." R. L.

LE FARRANT v. SPENCER, June 14, 1748.

(Reg. Lib. 1747. A. fol. 680.)

Devise by an *East India* captain of all household furniture (1), linen, plate and apparel whatsoever, includes only what is for domestic use, not what for trade or merchandise. Construction of the words "or" and "and." Medals (2), when to pass by a bequest of money.

JAMES SAUNDERS, captain of an *East India* ship, devised £1000 (g) a-piece to M. and C. to be paid at twenty-one or marriage; then gives them all his household furniture, linen, plate and apparel whatsoever; and in case of the death of either before marriage, every thing as before bequeathed, to go to the survivor or their issue; "I mean if either of them die unmarried before me." Then the residue he gave to be divided into fifths: two part to M. and C, or their issue, in default thereof to the survivor or their issue, one part to W. S. or his issue; and another fifth part B. S. and her children.

The first question was of the extent of the specific bequest; which it was argued, should take in all plate whatsoever, *India* and dymity goods, and some rough diamonds.

[98] Against which was cited the case of the Duke of Beaufort v. Lord Dundonald, 2 *Vern.* [739]!

Lord Chancellor said (3), That case depended on the locality of the description: and directed this to be sent to a master, to distinguish what goods he had for his own domestic use, and what for trade or merchandise: without which it was impossible to determine of the extent of the bequest; for it clearly included only the former, according to the opinion of the House of Lords, in *Prat v. Jackson*, 2 *P. Wms.* 302, which decree was the stronger, because of the words household stuff; as also because it was a construction to be made of marriage articles, where the wife was a purchaser of what she was to claim; here they are only voluntary.

On the other part of the will, Lord Chancellor took the testator's meaning to be, to devise to such legatees or their issue, as he knew not whether

(g) 1 *Eq. Ab.* 200. 3 *Atk.* 61.

(1) See *Hele v. Gilbert*, 2 Vol. 430; and *Carr v. Carr*, 1 *Meriv.* 541, note.

(2) Vide 3 *Atk.* 201.

(3) See per Lord Hardwicke, 3 *Atk.* 202.

they had children living or not; but to such as he knew had children living he gave it jointly to them and their children.

But was he not of that opinion, he could not construe it so as to make it void; but would construe the word *or*, *and*, and so vest it in the parents, the first takers.

N. B. It was said at the bar to have been determined by his lordship, that medals would pass by a devise of money, where kept with money; not where kept distinct (1).

(1) *Bridgman v. Dore*, 5 Atk. 201.

RANDAL v. COCKRAN, *June 17, 1748.*

Insurer after satisfaction stands in place of the assured as to the goods, salvage, and restitution in proportion for what he paid.

THE King having granted general letters of reprisal on the *Spaniards* for the benefit of his subjects, in consideration of the losses they sustained by unjust captures; the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers; who thereupon brought the present bill.

Lord Chancellor was of opinion, that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in *specie*, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid; although the commissioners did right in avoiding being intangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they see [99] who was the owner: nor was it material to them, to whom he assigned his interest, as it was in effect after satisfaction made.

SWYNFEN v. SCAWEN, *June 18, 1748.*

(Reg. Lib. 1747. B. fol. 393.)

A debt by covenant in marriage articles, and no mention of interest; the court would not reduce it lower than *5 per cent.*

The like interest allowed on a legacy for mourning.

SIR *Thomas Scawen* having three sons, gives in his life-time £6000 to *Lewis* the elder; and upon the marriage of *Lewis*, covenants to give or leave him £4000 more; but there is no mention of any interest in the deed.

To the two younger sons he devises the surplus of his personal estate, and a real estate after the death of their mother: and to each of the children £200 for mourning.

Upon his death *Lewis* borrows £4000 from the plaintiff, and dies. The plaintiff, as his administrator, brings a bill for a satisfaction out of the fa-

ther's assets for the £4000 due to *Lewis*, and for the £200 legacy, with interest at five *per cent.* for both sums.

Against this it was argued, that the two younger sons had much less share than *Lewis*; and that the court should not add to the inequality; this £4000 was not a debt on the estate, but should follow the nature of a legacy: the rate of interest for which, where none is mentioned, is in the discretion of the court.

LORD CHANCELLOR.

Had the younger children no other provision than the surplus, which is likely to come out so much below the share of *Lewis*, I should have endeavoured to have added to that surplus; but for what appears, they may have an equal provision with the other, by the remainder of a real estate, after the death of the mother, who is now very ancient. But had it been otherwise, this £4000 under the marriage articles, is not in the power of the court; not being a voluntary provision or legacy, or falling under any of the rules in which the court exercises a discretion; but it is a debt by covenant, affecting both real and personal assets; and for which an action at law might be brought, wherein a jury would have computed interest at five *per cent.* There is no ground then for a court of equity to vary the right upon a debt contracted for the most valuable consideration, marriage: but were there any colour for reducing the interest, there is the strongest reason against it, *viz.* his borrowing of £4000 at five *per cent.* which speaks, that he was entitled thereto as a debt from his father's death; which not being then paid to him, he therefore borrowed a sum equal to it.

[100] As to the £200 legacy, the general rule is, that where there is an ample personal estate, a personal legacy will carry five *per cent.* although the court sometimes exercises more liberal discretion in cases of younger children, or where charged upon land. If the court was always in these cases to enter into inquiries, how much the personal estate would produce, it would be inconvenient; although the court sometimes does it in family cases, where all arises out of the father's will, and all of the same kind, and a deficiency likely to happen: but this is for mourning; which, if he has acted properly with respect to his father, he has already expended out of his own pocket: and the plaintiff is intitled also to five *per cent.* for this (1).

(1) This was on a re-hearing, when Lord *Hardwicke* affirmed his former decree. R. L.

CLARKE v. SAMSON; June 21, 1748.

(Reg. Lib. 1747. A. fol. 714.)

Settlement, on marriage, of estates, leasehold and others, subject to incumbrances. The issue of the marriage not entitled to have them disincumbered out of their father's assets.

The word "*grant*" does not amount to an entire warranty in equity; nor always at law, where particular covenants are inserted.

In such cases the insertion of what is express, excludes the intendment of all presumption.

A. dies indebted; leaving a personal estate consisting partly in leasehold, which was subject to incumbrances by mortgage with covenant for

payment of the mortgage money; having devised this leasehold, with other estates, to his son for life, and after his decease to the issue of his body, with limitations over; making him executor and residuary legatee. Not long after his death the son makes a settlement thereof upon his marriage; and describing himself as heir and executor of his father, and reciting and referring to the will and the limitations therein, and reciting the intended marriage and jointure, grants and assigns this leasehold estate to trustees to permit him and his assigns to receive the profits during life, then to his wife, then to the issue male and female, then to such [other person or persons who should be his own right heir, or to such] other person as might claim it by will of his father. After the death of him and his wife, their issue bring a bill to have an assignment by the trustees; insisting that the settlement being for valuable consideration, although there was no express covenant to disincumber it, their father had obliged himself thereto.

LORD CHANCELLOR.

There is something particular and special in this case: but upon the whole circumstances the plaintiffs are not intitled to the relief sought; which is sought in prejudice of their father's creditors; for if it were otherwise, it would be immaterial to controvert this point; this leasehold being personal estate; the residue of which the plaintiffs are intitled to. As this stood originally on the will of the grandfather, this leasehold being part of his personal estate was subject to these mortgages; and the equity of redemption subject to all the rest of his debts, even by simple contract; but being specifically devised, other parts of the personal estate ought to be first applied; and if the father pays off the debts with his own money, he will have a right to stand in the place of the creditors to receive satisfaction out of the assets [of the grandfather.]

But then the question arises of the effect of the father's settle- [101] ment: and whether it gives a right to have the estate disincumbered for the plaintiff's benefit. I am of opinion, that from the nature of it, they have not such a right: I agree, that the father being executor might, according to the rules of law and equity, if he wanted money to pay, have sold and applied it to payment of debts, and the vendee might retain it against all claiming under the will, if no fraud or collusion. But the question is, What was the intent of the parties in this settlement? They knew they were making a settlement of the estate of the grandfather; and must know, that this with other assets was liable to his debts; and there being no covenant by the father to disincumber it, the intent was to leave it on the will, with regard to the issue of the marriage; and it seems to be made only to clear a doubt, whether the issue could take by purchase? There is no ground therefore to oblige the father out of his own estate to disincumber it: but it is said, the word *grant* of itself imports a covenant; which it does at law: but that is where there is no particular covenant, which there is here; and there is no instance where the court construes that general word to disincumber an estate, generally against every one, where there is a particular covenant in that deed, which limits the operation of it. Upon the whole therefore, the intent was to take this estate in the manner left by the grandfather's will, subject to his debts: but the father having paid them off, if the question was

between the plaintiffs and any person taking voluntarily under the father's will, who had made any other residuary legatee, I should have thought the plaintiffs had good right to have that personal estate so applied; but being between the plaintiffs and creditors, and no covenant, (except what restrains the word *grant*) it would be a stretch of equity toward injustice, should the plaintiffs have this estate so as to leave their father's debts unsatisfied.

SAVILLE v. TANKRED, *June 21, 1748.*

(Reg. Lib. 1747. B. fol. 395.)

Objection for want of parties. To a bill by representative of the pawnee of a chattel against a third person, merely for a delivery of it, the owner need not be a party.

THE bill was brought for an account, and for the delivery of a strong box, which was in the custody of the defendant, and in which were found jewels and a note in these words, "Jewels belonging to the Duke of Devonshire, in the hands of Mr. Saville;" whose representative the plaintiff was, and in whose possession they had been from 1695 to 1745.

An objection was made, that the Duke's representative should have been made party, to see if he claimed them; because it was said expressly, that they were his, and nothing said of an assignment to Saville.

[102] Lord Chancellor over-ruled the objection: for pawnee of a pledge, as Saville was, may bring *trover* or *detinue* at law for it without troubling himself with the pawner: for he has a special property. But suppose he was not pawnee, but had only the possession of them, and delivered them to another: that person has nothing to do with the Duke. Therefore let these jewels come into his hands which way they will, he may give the custody of them to any one, and have them back without hurting the Duke or his representative.

MARRYAT v. TOWNLY, *June 27, 1748.*

(Reg. Lib. 1747. B. fol. 479.)

Devise to trustees as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint-tenants; this not a joint estate, but to be construed as near it as may be, so that the conveyance must be at twenty-one respectively with cross remainders.

ELIAS PIERCE made his will Aug. 13th, 1724 (i), and devised all his real estate whatsoever and wheresoever, to trustees in trust to receive the rents and profits, and to make or renew leases, as occasion shall require, and upon the usual fines: and as soon as his three daughters Anne, Jane and Catherine, attained their respective ages of twenty-one, to convey the said real estate to them and the heirs of their bodies, and their heirs as

joint-tenants, and to whom he gave and devised the same accordingly: and for want of such issue, to the use of his brother, *Daniel Pierce*, of *Cork*, for life; remainder to trustees and their heirs, during the life of his said brother, to preserve contingent uses and remainders; with other remainders over. He directs the residue consisting of personal estate, among which he includes the rents and profits of the real estate, to be received by the trustees, to be paid to and among his three daughters equally share and share alike respectively, at their respective ages of twenty-one or marriage, which shall first happen: [provided they should not marry before nineteen; and if any should die unmarried before twenty-one, or should marry before nineteen, their shares should go to the survivors. *R. L.*]

In a codicil he says, that to prevent any disputes about the ages of his daughters, they were born on such days, as he there mentions, and their ages to be computed from thence.

The youngest daughter surviving her sisters, brought this bill, to have the whole for life.

For plaintiff. *Joint-tenants* being a proper known word in law, ought to be construed, and a conveyance made accordingly, as far as the law will admit: *i. e.* jointly for their lives with several inheritances: but this severalty is not from the testator's intent, who would have made it joint throughout if the law permitted it, but from necessity. The express word *joint-tenants* must have its operation, whereas it will be rejected, if they are not construed joint tenants for life: and it must be carried back to the words *three daughters*; for it can have no effect on the word *heirs* generally, or *heirs of their bodies*; and if it had been so expressed, there would be no doubt. If construed otherwise, upon the death of two daughters without issue, their shares would go over to the remote [103] relations in remainder during the life of the other; to prevent which inconvenience the court often adds words, or changes or into *and*. In *Barker v. Giles*, 2 *P. Wms.* there were words both of joint-tenancy and in common, and the court directed, both should be satisfied. In *Tuckerman v. Jefferies* the devise was of all his estate to two nieces *E.* and *J.* to be equally divided between them; and from and after their decease, to the right heirs of *J.* Although the words were strong to make it a tenancy in common, *Holt*, C. J. held it a joint-tenancy during their lives; because if they should take by moieties, it might happen that the right heir of *J.* should never take the whole: here the conveyance was to be made of the whole and to all the three daughters; for the words import one conveyance: so even if they were to take in common, three conveyances would not be necessary. In the disposition of the personal estate the testator shews he knew how to make use of proper words, where he intended a tenancy in common, there being more than two daughters, there would be no cross remainders: and the testator might have intended by this joint-tenancy to prevent a tenancy by the courtesy.

For defendants, the children of one of the deceased daughters, and the husband and children of the other, it was argued, that the daughters should be tenants for life of their shares, and that the heirs of their bodies should not take by limitation but purchase, by way of remainder. The words require a conveyance of the legal estate to each daughter at twenty-one; otherwise the material word *respective* must be rejected. The

law in some cases will admit the transposition of words; but not to make joint-tenances, which are odious in law. Some of the daughters were married in the testator's life, and there being a prospect of their having issue, he could not intend the whole should go to the survivor.

LORD CHANCELLOR.

There is certainly some obscurity in the present case, arising from the inaccurate drawing of the will; the rather because the drawer had used some legal terms without meaning them in the legal sense. And the court, not being able to give each word its strict legal sense, must therefore find out the construction, so as to answer the reasonable *intent*, which the testator must be supposed to have had, of providing for his daughters and their families. It happens luckily to assist the court, that the drawer of the will has inserted directions for the trustees, to convey; and whenever there are such directions for the trustees in whom the legal estate of the fee vested, the court has held it in its power to mould it so as best to answer the intent of the testator; and not so as to fulfil the words of the will; which has been always the rule in marriage articles; and if that was this case, there would be no doubt: but even on wills, the court has used the same latitude, as on Sir *John Maynard's* will. Lord [104] *Cowper* took advantage of such a direction, and thereby thought himself warranted to insert trustees to support the contingent remainders; and this is the ground of distinction (if a true one) of the same words receiving a different construction in cases executory and executed. As to the intent, the first question, in order to determine the sense of the subsequent words, is, at what time the conveyance is to be made, whether all at once upon the youngest daughter's attaining twenty-one, or severally at their respective ages of twenty-one? And I am of opinion, that the intent was, that the trustees should convey each daughter's particular share to her at twenty-one, and not wait till the youngest attained twenty-one. Taking it upon the words, *respective* is generally a word of division and distribution; for they must attain their ages at different times (*k*). This would be a proper construction, if it stood here; but it is strengthened by the other parts of the will and codicil, as in the distribution of his personal estate, and what he had transubstantiated from his real estate; for the construction in both clauses must be the same, although he has not repeated the word *respective* in the former clause; and this is confirmed by the codicil; which, as he possibly might know, that the ages of his daughters were not registered, he meant as a declaration of their ages, to shew when all the trusts of the will should be performed, and is therefore indicative of his intent. Then the effect this will have upon the subsequent limitations, is, that they must be construed consistently therewith, which a joint estate is not; for if their titles come at different times, and by different conveyances, they cannot be joint: and it were strange, that the testator should mean, that all these three shares should survive to the youngest for life, in prejudice not only of the husbands of the other daughters, whom he might not regard (though certainly he had some view in the marriage to them), but also to the prejudice of the issue during the life of the aunt. Then the carrying back the

word *joint-tenants* to the daughters is not consistent with the direction to convey respectively: nor is there any ground for the construction put on *joint-tenants* for the defendants; for the want of the words *for life* will prevent the turning it into a remainder, so as to take by purchase; and it would destroy the subsequent remainders over. The question then is of the true construction; and I go a middle way, founding myself upon this being an executory trust, with direction to convey; and if there are technical legal words in the will, inconsistent with other words in the will, which cannot have their proper effect, I must give them their effect, *cy pres*, agreeable to the intention of the testator, and will construe it *like joint-tenants*, so as to create cross remainders between them. One great reason of inventing cross remainders is the impossibility of the issues of different persons taking as joint-tenants: it is true that the law will not admit cross remainders among more than two; but that is only where it is by implication (1); for by express words it may be among several; and the not admitting it by implication at law among more than two, was for a technical reason; because the law avoids the splitting of tenures. But if I am right, it amounts to an express direction to [105] be like joint-tenants; and then that difficulty of the law is out of the case in a court of equity; which must take it as if expressed; for *want of issue* means want of issue of all the daughters, then to go over; not upon the death of one or two without issue; which is the construction also the law would put upon it, if there had been only two, as in *Holmes v. Menil*, *Skin*. and several other cases. And this answers the meaning of joint-tenants, as far as possible, consistent with the intent; for it is impossible he could mean, that they should take strictly as joint-tenants, having directed respective conveyances, but as near joint-tenants as could be. I said, there would be no doubt, if this was in marriage articles. If therefore articles directed the estate to be to the husband and wife, and the heirs male of their two bodies, then to the heirs female, to take as joint-tenants; the court would have directed it to the father for life, then to the mother for life; and to the daughters as tenants in common, with cross remainders to themselves.

The conveyance here must be directed at twenty-one respectively: then cross remainders to the several daughters; by which survivorship will be preserved upon the death of any daughter without issue; and the most that a lay person means by *joint-tenants*, is, that the estate should survive (1).

(1) In Cowp. 797. cross remainders have been admitted between three; and in *Doe, ex dem Burden v. Burville*, Easter 13 Geo. 3. B. R.

(1) See Reg. Lib.

NEWLAND v. CHAMPION, July 8, 1748.

Where a creditor may make other persons, besides the personal representative of the testator, parties.

THE widow or representative of *Newland* brought a bill for an account against *Sir George Champion*, the surviving partner of her husband.

Her brother, who was a creditor of her late husband for £1000, also brought a bill against Sir *George Champion* for an account.

These two causes were brought on together: and it was insisted, that the second bill ought to be dismissed, for it would multiply suits, if every creditor might not only bring his bill against the personal representative of his debtor, but also against every debtor of that debtor; although under special circumstances it might be allowed: as where there is any delay in the representatives, or collusion between the representatives and debtor (1). But here seems to be a good understanding between the representative and the creditor; and though collusion is suggested, it is not proved; and therefore is out of the case.

[106] LORD CHANCELLOR.

The general rules are plain, that a creditor of the testator or intestate need not make any body but the personal representative a party. At the same time in this court, if there are any person who have possessed the estate, or any debtors of the deceased, and any collusion between them and the representatives, they may here, though not at law, follow the assets and make them parties, and demand an account against them; but that is not to be done, unless there is some proof of collusion (1); but I take the case of partnership to be different; and there was no suggestion of collusion, yet I do think the bill would have been demurrable to, as has been insisted on. Many bills are brought in this court, not only making the representatives parties, but also any other persons who have possessed the specific assets; and there are many instances where the surviving partner is made party, that they may have an account of the personal estate entire: and if this bill was dismissed, it would be to say, that this creditor for £1000, should not have it in his power to check this account of the personal estate of his debtor whose effects are in the hands of Sir *George Champion*. So that this is a possession of a specific part; therefore though there is no proof of collusion in this case; and the brother of the wife, who is plaintiff in the first clause, is plaintiff in the second, which might be a presumption of confidence between them; it is proper, and I shall direct an account between the plaintiff in the second cause and Sir *George Champion*.

Ex Relatione.

(1) Or insolvency, &c. See *Utterson v Mair*, 2 Ves. jun. 95. *Alsager v. Rowley*, 6 Ves. jun. 740. and the cases there cited; also *Burroughs v. Elton*, 11, Ves. 29.

MILNER v. MILNER, July 11, 1748.

(Reg. Lib. 1747. B. fol. 561.)

Mistake in the computation of a legacy rectified according to the intention, though contrary to the words.

SIR WILLIAM MILNER bequeaths a legacy in this manner: "I give my daughter *Mary* £3500, which with £6000 she is intitled to by my marriage settlement, and £500 from her father-in-law (2), make up £10,000, which [is the sum] I design [she shall have] for her fortune (m).

(m) A specific sum being given as a residue, and being miscalculated, the real residue shall pass, 2 Brown, 48. Post, 126.

(2) "Grandfather," in Reg. Lib.

It happened that she was intitled only to £5000, by the settlement, and now brings a bill to have £4500, raised to make it up £10,000.

LORD CHANCELLOR.

There are two questions on this bill; first of the meaning of the testator? Secondly, of the authorities proper to be cited? As to the first his intent appears plainly, and by express words, that she should have £10,000, and that presently and in principal money. Therefore the objection, that by possibility she might have so much, avails but little. In the construction of wills, the intent is principally to be regarded; and [107] to answer that, a mistake in the computation ought to be relieved against (1) in cases of this sort, the court is not always confined to the order of placing the words in the will; but to make the sense plainer, a change ought to be made; an objection of great weight, was, that supposing the testator had given more than was sufficient to make up £10,000, it should not have been abated; and by the same reason she should only have the express sum now; which would certainly follow, were that true; but I am of opinion, that in that case it should have abated, to answer the general intention of giving only £10,000, and for that same reason shall an addition be made in the present case. Another objection of weight was, that the testator had expressly given but £3500, which were the only proper legatory words; and ought not to be erased to substitute in their room mere intentional expressions, such as in the conclusion. But though it is true, that in strictness, the words in the conclusion are not legatory: yet they must be complied with, as they discover the ultimate end, which the testator had in view.

Secondly, in support of this, some authorities may be cited. *Swin. part 7. cap. 5. sect. 13. Errors in Legacies*; that where the meaning of the testator is plain, it shall prevail against the words, although contrary; whether the error in the *quantum* was more or less. Of which opinion was *Baldus*, who was an author of much greater weight in the *civil* law than who was of a contrary opinion. To the same effect is *Godol. part 3 p. 447.* both these opinions are founded on the text in the *Digest de errore quantitatis legati*; and the comment thereon, and *CUJATIUS* tom. 2. p. 818. *Socini Concilium* 98, 163. Legacies given as provisions for children ought to be construed liberally. These authorities shew strongly, that the meaning of the testator, though contrary to the words must be complied with. Indeed at the time some of those books were written, the *statutes of frauds* had not taken place; and as the law then held, parol evidence might be given in all courts to explain a will, and perhaps some contrariety of opinions may have been on this subject, where the intention appears on the face of the will, and where not: almost all the authorities, of the civil law agreeing in the first case, that the intention shall prevail against the words; but some have thought otherwise on the latter case, where the intention appeared not on the face of the will, but only by matter *dehors*; although the better opinion even there is, that the intention shall prevail; however that difficulty cannot be here, as the

(1) See *Phillips v. Chamberlain*. 4 Ves. 53. and *Skerrat v. Oakeley*, 7 T. R. 492. If, however, such mistakes be merely presumptive or conjectural, and are not inconsistent with any part of the will, they cannot be corrected. *Mellish v. Mellish*, 4 Ves. 45. *Sims v. Dougherty*, 5 Ves. 243. and *Whitfield v. Clement*, 1 Meriv. 402.

intention appears on the face of the will. Upon the whole therefore she is intitled to have the £4500, to make up the £10,000 intended for her fortune.

ARNOLD v. CHAPMAN, July 12, 1748.

(Reg. Lib. 1747. A. fol. 649.)

Mortmain—Charities—Resulting trust—Legacy to *A.* and *B.* they are made executors, and land devised to *C.* paying £1000 to executors, the residue to a charity.

This £1000, is a charge on real estate which by the *mortmain* act is not well disposed, and results to the heir. Assets not marshalled in favour of this bequest. This devise held a sale of the land for £1000; and the bequest of this £1000 held intended to the executors as such, for the purposes of the will, or as assets for debts; and not otherwise: so that, if good, it would not have lapsed by their deaths.

THOMAS EMERSON (*n*) devised £100, and all his books to *A.* and *B.* whom he afterwards makes his executors, and a copyhold estate to the defendant *Chapman*; he causing to be paid to his executors the sum of £1000, and after payment of debts and legacies, the residue and remainder of all his estate, freehold, copyhold, leasehold, plate, rings, stock, &c. to the governors of the *Foundling Hospital*, and their successors for ever.

The executors bring a bill for this £1000, to which there were several claimants; for beside the charity, on whose behalf it was insisted, that the assets should be marshalled, and the debts and legacies charged on the real estate, that the personal might go clear to the charity, the devisee of the copyhold insisted, that the £1000 should not be raised at all; for that it was the same as if the condition was to pay to the charity; which was an unlawful act that could not take effect, and therefore void, and the estate absolute.

The next of kin insisted, that as by the *statute of mortmain* it was void as to the charity, and as the particular devisee could not take without performing the condition, it should go as part of the testator's estate undisposed, according to the statute of distribution.

For the executors it was said, the devise to the charity was in very particular words, which was saying, nothing else was intended them. The executors took this in their own right, not as executors: in the beginning of the will, he has not named his executors, and therefore does not give them the books and £100, by that name; but when he has once made them executors, he calls them afterward by that name for the sake of brevity; and it would be hard that the accidental circumstance of making them executors should induce a different construction.

It was further argued to be a resulting trust for the heir at law. Some things may be assets in the hands of executors, which yet are not chattels (*Office of executors*), as lands devised to executors in fee to be sold for payment of debts, are assets before the money raised, because given to them *eo nomine* as executors, and if they should die, or not prove the will, it would be a trust in this court; for their refusing to act could not hurt the creditors. If this was a devise to the heir, paying £1000, and the executors enter for breach, they would have had the land, as they would have had the £1000. The plain meaning was, that this should be assets for the

purposes of the will; and where he intends his executors a benefit, he names them; but where they are to take by virtue of their office, he calls them executors. If then it goes to them as execu- [109] tors, by the statute of *mortmain*, lands cannot be devised to be turned into money, and so to a charity; because it is an indirect way of doing what the statute has prohibited directly, to prevent a man's disinheriting his heir in his last moments. In the case on the will of Sir *John James* (1), a real estate was to be turned into money by a limited time, and then for the benefit of two hospitals, which his *lordship* held to be within the statute. One devised real estate for debts, and then the surplus of all his estate to a papist. The question was, whether the debts might be all turned upon the real, so that the papist should take the personal? But Sir *Joseph Jekyl* would not suffer it to be argued: and this is stronger than the papist act; for that is only a disability; but this makes the gift entirely void. If the personal estate is to be exonerated, it must be by construction of this court: which will not, unless compelled, make a construction to disinherit an heir at law: nor can the devisee have it: he is a trustee for this £1000, and there is no case where a charge by way of condition is not considered as a trust in this court. Suppose it a devise on condition, that he and his heirs paid the annual rents to a charity: that would be a trust, though by name of a condition, and void, and the devisee could not take.

LORD CHANCELLOR.

There are some intricacies in this case; but on the whole, this £1000, or so much as is above debts, shall go to that person, to whom from the reason of the thing and the inclination of the law it should go.

The first question is, in what capacity the executors take: whether for their own benefit, or as executors? For if they take in that capacity, it must go for the purposes in the will; and I am of that opinion; any other determination would break in on an established rule, and make a precedent of bad consequence; by saying that when they take barely by the name of executors, they should take for their own use. It is true, it may be given for themselves, as if out of a personal estate; for then there could be no other intent, but that it should be a designation of the persons to take, whether it was specific or pecuniary; otherwise it would be nugatory. In every case where real estate, or a sum of money out of it, is given by name of executors, it shall be considered in that light, and for the purposes of the will. So are cases in the *Office of executors*, which are as strong as the present; as that the lands of a *villein* are assets; so was the *villein* himself: therefore what comes as accruer from him, must be assets. Though they had died before, it would have been a good bequest of this £1000, on this copyhold, for the purposes of the will, so far as they could take effect, that is, for debts and legacies: and if one of them should die, it would survive to the other; and there is no [110] determination to the contrary. It must therefore be considered subject to that duty which is upon them by their office; and it is material that where he speaks of them with relation to their office, he calls them executors; when he gives to themselves, he calls them by their own names.

(1) Amb. 20.

The next question is, to whom it shall go? and first, whether the law will allow it to go to the charity? The *Foundling Hospital* is certainly a good and laudable charity, and should receive all possible encouragement, but the rules of law cannot be broke into, and laid down different for that from all the other hospitals in the kingdom. Had he devised the copyhold estate on condition to pay £1000 to the governors, it would have been void by the statute; he has taken another method, by including it in a residuary bequest of real and personal estate: and it is said, that they can take, because by giving it to the executors he has made it part of his personal estate: and he may undoubtedly, if he pleases, turn it into personal estate; but it must be for lawful purposes. But here the act intervenes; which, if this was allowed, would be easily evaded; for it would be only directing the real estate to be sold, and the money to the charity; and in the case of *James* (1), this was determined to amount to a devise of the land itself; because all charges, trusts, sums of money, &c. devised out of land to a charity, are made void by the act. It is said (o), the assets should be marshalled; and this case put, that since this act, a man may say he charges his real estate with debts and legacies, and gives his personal estate to a charity; possibly that might do, but it would go a great way toward overturning this act; but as to that I will give no opinion; for there an intention appears in the testator: here no exoneration is intended by the will. As to the rule of the court of marshalling assets, I must take it to be the same, as it was before the statute; and if £1000 was devised, and debts charged on real and personal estate. The rule before the statute was, that the debts should be paid out of the real estate, and the legatees should come on the personal. The court will do the same now; not by way of standing in the place of creditors, but by turning the debts on the real estate. But there is no rule, that where real and personal is charged, and the residue given to a legatee or children, the court would in such case turn the charge on the real, to give the whole personal estate to the legatee. In case of papists, the court would not do for them what it would not do for any one else; and this is a stronger case than that. In *Roper v. Ratcliff* (2), it was resolved, that whatever is taken out of the real estate shall be considered as real; and this would be taking out so much of the real for the charity; which therefore shall not go to it.

As to the devisee of the copyhold holding without paying this £1000 it is said to be the same, as if on condition to pay to the charity: [111] and were it so, it would be void; being a condition to do an unlawful act; which the law will prevent. But this is not an unlawful act; not being so strong as if expressed to go to the charity. In regard therefore to him, it is lawful, and he is obliged to pay: and this being a devise to a stranger on condition to pay, at law the heir might enter for breach: but in this court he is to be considered as a trustee. The money then is a charge; and the question is, what is to become of it.

The next of kin cannot have it; because it would be on a principle contrary to their right; for if it is turned into personal, it is given, and must go to the governors; and no part of the personal is undisposed of.

(o) Assets not marshalled to support a legacy contrary to law. 2 Ves. 52.

(1) Amb. 29.

(2) 9 Mod. 190. 10 Mod. 237. and Bro. P. C. 360. oct. ed. *quod vide*.

The heir at law then is entitled by way of resulting trust; because this £1000 is mentioned by way of condition on the devise of the real estate, and is to be paid to the executors; and to be sure if wanted for debts, it would vest, and must be admitted by the executor for that purpose only, to be turned into personal estate. But the act has prevented this transmutation for the benefit of the hospital; and then it remains part of the real, undisposed by the will; for the executors take it only as trustees: and any part or profits of the real estate undisposed, will be a resulting trust for the heir: as in the case of the Duke of *Beaufort*; where a small part of the profits, a year and a half only, went to the heir, being not given by the will. This devise is a sale in effect to *Chapman* for £1000, and the purchase money arising from the estate must go to the person intitled to that estate. The only remedy the law would give in this case, would be to the heir; he might bring his ejectment: and if this trust is not good, shall this court take it out of his hands for the benefit of any one else? no, for the heir shall have the benefit of any part not well disposed of.

As this charge therefore is well made on the real estate, but not well disposed of by reason of the act, it must be considered as between the heir and the hospital, as part of the real undisposed, and to be for his benefit.

ELLISON v. AIREY, July 13, 1748.

(Reg. Lib. 1747. A. fol. 699.)

Legacy of £300, to Elizabeth, to be paid at twenty-one or marriage, but if she died before, then to the younger children of Francis E. having died unmarried under twenty-one. Held to vest in such of the younger children as were living at that time.

A WOMAN devised to the son and two daughters of her nephew *Francis Ellison*, £10 a-piece by name; then devises £300 to *Elizabeth Paxton*, to be paid at her age of twenty-one, or marriage; and interest in the mean time for her maintenance and education; but if she died before twenty-one or marriage, then to the younger children of her nephew *Francis Ellison*, equally to be divided to and among them; the said eldest son being excluded from any part thereof (q).

Some of the younger children were born before, some after [112] the making of the will; and some after the death of the testatrix.

It was insisted, that this should take in all the younger children; for it is not to vest at the death of the testatrix, who therefore could have no view to that. It is said, *excluding* the eldest; and who will be eldest, cannot be known till the death of their father. The testatrix knew the eldest was otherwise provided for, and therefore gives him nothing, which is making a provision upon the same motives as in a marriage settlement: in which younger children always mean, *all younger children* which shall be born: and had she intended to have excepted any others, she would have excluded them as well as the eldest: when she intends those already

(q) *Postea*, 201. 2 Ves. 83. *Proc. Chan.* 470. 2 *Eq. Ab.* 264, 331. *Gilb. Eq. Rep.* 136. 1 *Brown*, 386.

born any particular benefit, she names them; and by her not naming them in this clause, but giving by another description, she could not intend it particularly for them. Wherever there is a provision for younger children, *all* are meant; and on that foundation it is, that a posthumous child shall take: for the reason of that determination is, that it is a younger child, no matter when born.

For a child born after the date of the will, but before the death of testatrix, it was argued, that the testatrix intended all younger children capable of taking, at the time the will takes effect. The will does not speak till the death of the testatrix; at which time this child falls within the description. In 2 Vern. 105, is a case in point, that a child after the making of the will, and before the testator's death should take. They agreed with the defendants in the other point, that children afterward born should not take. 2 Vern. 545 (r), a devise of personal estate to a man and his children: a child born after the testator's death shall not take; because it vested on his death, and shall not be divested. In *Web v. Web, Hill*. 1735, there was a devise of the residue of personal estate to the testator's brother *H.* and all his children, to be divided amongst them share and share alike: *H.* had several children, the testator dies; and six months afterward another child is born: Lord *Talbot* held, that this child could not take; which case was stronger than the present, there being the word *all*. In *Hale v. Hale*, 6 G. 2. was a devise of £2000 to all the children of my nephew *J. Hale*, who shall be living at the death of *Amy*; and afterward a devise of the moiety of the residue of the personal estate to all the children of *J. Hale*, payable at twenty-one or marriage. The question was, whether children born after the death of the testator could take? And the court was of opinion, that as to the £2000, they should, if born before the death of *Amy*, upon the particular words of the will: but as to the residue, those only who were living at the death of the testatrix should take. In *Heath v. Heath*, (1), Feb. 11th, 1740, before Lord Chief [113] Baron *Parker*, sitting for Lord Chancellor, there was a devise of copyhold to trustees, to sell for payment of debts, and the rest of the money and personal estate among all the children of her brother and sister *Heath*, respectively, male as well as female, in equal proportions: they had only four children at the time of making the will; and after the death of the testatrix, another was born. The court was of opinion that the child born afterward could not take. The present case differs from those of marriage settlements; for then there are no children, and consequently there must be something future to answer the description: and from the nature of the contract, the same motive going through, and the same persons in contemplation, it must include all.

For defendants who were born before the making the will, was further cited 1 *P. Wms.* 342. that a devise to children and grandchildren should refer to such only, as were born at the time of making the will; and the difference taken in *Wild's* case, 6 Co. 16. that a devise to one and his children, if the children are not in *esse*, shall be taken as words of limitation; which goes on this foundation, that children not in *esse* should not take,

(r) 2 Vern. 710.

unless devised by words that relate to futurity; and the general rule of law is, that the person to whom the gift is made, must be in *esse*, unless an intention appears to the contrary. There is no necessity for presuming such intention here; for there were persons in *esse* to satisfy the words of the will; which words are the same thing, as if the children were particularly named; for a description is sufficient. There is nothing here to shew an intention to take in future persons, or to take this out of the rules of law, which were formerly so strict as not to allow a posthumous child to take at all (2). The words *younger children* are only an exclusion of the eldest, and therefore mentioned here, and not in the other clause where he was included. Beside, it is common in wills to make use of different words for the same thing: although the will has its operation from the death of the testatrix, yet the intention shall be collected from the circumstances at the time of making the will; and here she is to be presumed to have an affection for the children in *esse* at the time of giving them this legacy, which is intended as a provision for them; and which cannot be if this construction prevails; for then there must be an impossibility of payment to any one of them, till the death of the father; for not till then would it be known who were to take. And by extending this to the children born after making of the will, or death of the testatrix, it will be more probable, that the father for whom no bounty was intended, might possess part of this legacy as representative to one of his children, who lived but one month.

LORD CHANCELLOR.

[114]

No certain rule can be laid down in cases of this kind; they must be various, as very few words will vary the evidence of the testator's intention, and consequently the meaning of the will: but there are general principles, which are these. The court generally takes it, that their ought to be a legatee in being; and therefore will not construe a will to extend to persons not in being, unless the testator shews his intention to be such, by words in the will; which is the rule at common law as to contingent devises and remainders; for they* never construe them contingent or executory unless compelled; nor will they adjudge lands to go to an infant in *ventre sa mere*, unless appearing to be so intended from the words of the will; always avoiding it unless there is a clear intention to the contrary, and this is to avoid suspending; which always tend to make property uncertain, and to the inconvenience of making more divisions than the

* A trust term to raise a sum for such child or children as should be living at A's death, a posthumous child held to take within the meaning of the trust, which ought not to be construed so strict as a limitation at law: *Proc. Chan.* 50. 1 P. Wms. 246, 486, 340. 2 P. Wms. 446. 2 Atk. 117. 3 Atk. 203. 1 Ves. 85. Barnard, 272; all these cases are in favour of the posthumous child; but in 1 P. Wms. 342, on a devise to children and grand-children, a grand-child in *ventre sa mere* as testator's death was held not to take, as such a devise refers only to such as were living at the making the will; secus if the devise had been to such as were living at the testator's death, and vide 2 Brown, 47, where Sir Lloyd Kenyon ruled, from Lord Hardwicke's reasoning in this case, that the description of children of A, does not extend to a child in *ventre sa mere*, the child not being in *esse* at the time, and therefore incapable of taking; which he recognized afterward in 2 Brown, 63, where he held that a child in *ventre sa mere*, shall not take under a bequest to the children of A. living at the death of testator: In 1 Brown, 386, an after-born child was held to take a vested legacy: ante, 86.

(2) See *Miller v. Turner*, ante, 86.

testator meant. Therefore when there is a devise to children, if it was to be suspended till the death of the father, it might be little beneficial to any of them; and where they are made tenants in common, and consequently no survivorship between them, the court would avoid its going over upon the death of any of the children to the father; for whom the bounty was not intended (r). And although this cannot be avoided in some cases; yet the extending it further, by allowing it to go to children after born, would make it more probable, that the father might take, as representing some of his children. These are the general reasons, which the court has gone upon; and I do not know, but several of the resolutions on this head might be contrary to the real intention of the testator; and that for the sake of convenience. There is a great difference between such devise as this and provisions by marriage settlement; for as before marriage there is no children, to whom it can be applied, it must mean all; and there is no place to draw the line in; nor any reason why it should be for one more than another: it is a parental provision made as a debt of nature, and therefore all are intitled. These are the general rules; but this is a middle case, depending on the particular penning of the bequest. It is said, the word *younger* must be restrained to the time of making the will; others say, to the death of the testatrix; others to the death of *Elizabeth* under age and before marriage; and others, that it should go to all younger children. To confine it to the time of making, it is said, that she had taken notice of, and given by name to, the children then in *esse*; who are therefore to be considered as the objects of her bounty; but I think, it rather hold, the contrary way; for where she intends their particular benefit, she names them; when not, she uses the general words *younger children*. As to her intending it to all the younger children, there may be a case of that kind, but it would

[115] be liable to all the inconveniences, which this court has endeavoured to avoid. *I am of opinion, that it means such as should be younger children at the death of Elizabeth before twenty-one or marriage*; it is a contingent legacy, and there is no reason to confine it to the time of making the will, or the death to the testatrix; for neither was the time, upon which the legacy was to vest; and therefore as the whole is suspended till the death of *Elizabeth*, there is no inconvenience to wait till then. When is this legacy given? at the death of *Elizabeth* before twenty-one or marriage. What is to be done with it? to be divided equally. When? that is not specified: but the natural way of thinking is, that she intended it should be divided when it vests; and there is a stronger reason to think, she meant so; for she has not directed where the interest should go during the life of *Elizabeth*, but after her death before twenty-one or marriage there is no direction about the interest; which is evidence, that she intended it to be actually divided at that time: and if it be divided, it must be vested. This construction answers the words of the will, and the intention avoids all inconveniences, fixes a proper period, and answers what negatively appears to be the intention of the testatrix, by her applying the interest after that period: and also finds out, who is the el-

(r) Where an estate is left on the contingency to the issue of any one, all born before the contingency happens, shall take, none born after, Cowper, 309, where Lord Mansfield says, the doctrine in this case is laid down by Lord Hardwicke, vide 2 Atk. 121. 2 Ch. Rep. 69. 2 Mod. 104.

dest viz. such as should be so at the death of *Elizabeth* before twenty-one or marriage.

There was a direction, that the trustees of the will should be paid for their trouble as well as expense: and it was objected, that this might be of general prejudice; because trustees frequently draw wills and settlements themselves.

But *Lord Chancellor* said, this was a legacy to the trustees; to whom the testator may give this satisfaction, if he pleases. And in *Serjeant Hall's* will, *Sir Richard Hopkin's*, and in the case of the *Dutchess of Marlborough*, there was a great allowance made for their trouble; and no inconvenience, because it can carry it no further, than where there are particular directions. Let the *master* therefore inquire, what they might reasonably deserve for their trouble.

STOCKWELL v. TERRY, July 1748.

(Reg. Lib. 1747. B. fol. 491.)

By 2 E. 6. 13. land in its own nature not fit for tillage, pays no tithe for seven years after improved: but if not fit for tillage by reason of woods, &c. pays tithe presently after improvement.

THE bill was by a rector for payment of tithes in kind of 300 acres of land.

Two bars were set up, the first general to all acres; the statute 2 E. 6. 13. by which waste ground, improved into arable or meadow, shall not pay tithes, till seven years after the improvement is completed; as to which the case appeared, that the land in question was a [116] common field for sheep, horses, and cows, but not fit for fattening them, being over-run with brushwood, briars, and other weeds; the parson was intitled to tithes of calves, milk, wool, &c. out of it, and it was proved to be worth two shillings *per* acre, before it was improved.

The second was particular to forty-eight acres, parcel thereof: as to which an agreement had been entered into between the defendant and the parson, and those who had right to feed in the common, for the making an inclosure; and an act of parliament was passed for that purpose, by which they enjoy all their rights in severalty, as they did their rights of common before. These forty-eight acres were allotted to the defendant, in lieu of his common; and the question was, whether this was still covered by a *modus*, which had been paid for it before?

For plaintiff. This land was not within the statute; for it must be *naturâ suâ ruralis*, 2 *Inst.* 656. and the cases there put, which are much stronger than the present. *Cr. E.* 475. 1 *Rol. R.* 354. 2 *Bul.* 163. and 6 *Mod.* 96. shew that the statute intends only such lands as were merely barren, and made good by industry; and if it yielded any profit before, as wood, &c. it is not within it. This ground yielded profit before, and cattle were kept on it; which could not be if it was waste.

As to the *modus*: These forty-eight acres are of another nature, and not to be covered by it: if there is a *modus* for any thing, and a new part is joined to it, that addition must be paid for: as if a *modus* for two mills, and a third is added, the *modus* will not cover it: so if for a garden, and

any addition is made to it? If a buck and doe are paid for a park, when disparked, tithes must be paid for it.

For defendant. This act was made to encourage agriculture, by the not losing a tenth of the improvement: although the land yields some fruit, yet if barren *quoad agriculturam*, it is within the statute; which must mean such lands, as are not fit for agriculture without considerable expense; as a recompence for which this encouragement is given. Defendant has been at great expense in clearing and improving this ground, and will not have the benefit of it, if to pay tithes the first seven years.

As to the agreement, the general view of it and of the act of parliament was, that none should be prejudiced; and that it should be exactly in the same situation as before, except that it should not be in common. But the construction contended for, will give the parson, whose former right was preserved, what he had not before.

[117]

LORD CHANCELLOR.

If there had been a suit in the ecclesiastical court; and defendant pleaded the statute, as here; and the plaintiff denied, that this was within it; there must by the nature of their jurisdiction have been a prohibition for want of a trial; and it would be afterward tried. But this court is not so bound; it is to judge of fact, as well as law: otherwise every *modus* must be sent to trial: but there are many decrees here, and also in the *Exchequer*, for payment of tithes for want of proof of a *modus*; for something should be laid to induce a doubt: otherwise it would be putting the parties to unreasonable expense. In this case a sound discretion should be used; for by too strict a construction, the court might bring a burthen upon the party improving, which would also tend to impoverish the church; for by these improvements, livings are made better: and though the present incumbent were not capable of tithes for seven years, yet, after that, the profit will be increased. On the other hand, it will greatly prejudice the incumbent, to call land, in some degree fertile, barren land; for he will thereby be deprived of his tithes. I must be guided by the determinations made on the act, all which have been agreeable to Lord Coke's comment, 2 *Inst.* 655. where the rule laid down is, if land is in its own nature so barren as not to be proper for agriculture, after it is improved it shall not pay tithe: but if in its own nature it is fit for tillage, but by reason of wood or other accidental circumstance it was not turned into tillage before; upon the taking away that accidental circumstance it shall pay tithes presently on being turned to tillage: for the act does not consider the expense, but that you may by possibility be paid, as by the timber, underwood, &c. But if afterward this land will not produce unless dunged or chalked, the court has considered this as evidence of its being barren in its own nature, not proper for corn without additional improvement. It is admitted that this land produced three crops of corn, without any thing but ploughing; but objected that chalking will be necessary; and so it may in the course of common husbandry. But the question is, what was necessary for the first crop? The way of arguing for defendant would throw the expense upon the first seven years; whereas the benefit is to continue for ever. There is an expense in gaining land from the sea: yet no seven years allowed, though overflown time out of mind; because the benefit is lasting: but if an additional expense is necessary to make it

produce the first crop, seven years shall be allowed: it is admitted, that this land is not barren; and there is much land which can neither be called fruitful or barren, that pays tithe.

As to the forty-eight acres, I am of opinion, that in this case [118] they are covered by the *modus*. I admit the case mentioned, and that by disparking the *modus* is gone; and if the owner dispark part, he shall pay the same *modus*, and also tithes in kind for what is disparked; because it was paid in nature of a franchise, and not for lands. But suppose the owner with consent of the parson dispark some to be enjoyed as before; I should think, it was the incumbent's intent, that it should be still enjoyed as part of the park, and no tithes in kind should be paid for it; for otherwise the agreement with the parson would be useless. So if this agreement had been between a lord of the manor and the other commons without the parson, and they had turned it into several ownerships, it would be liable to the right of tithes, which the rector has over the whole parish. But here has been an agreement by act of parliament, to which the parson was party; and although the recital uses only general words, yet it shews plainly the intention of the parties to be, that every person should enjoy his allotment in the same manner as he did the thing in lieu; and that was subject to the *modus*.

Let the bill therefore be dismissed as to the forty-eight acres, and as to the rest, an account be taken of the several tithes to be paid; and the plaintiff, except as to the proof of the *modus*, have his costs; for I never knew a decree for an account of tithes without costs, unless there was a tender.

Ex Relatione.

FONNEREAU v. FONNEREAU, August 5, 1748.

(Reg. Lib. 1747. A. fol. 520.)

S. C. 3 Atk. 645.—Legacy to F. when he shall attain twenty-five, interest in mean time, and part of the principal to place him out; vested and transmissible though he dies before twenty-five (1).

Legacy considered vested, where the testator has given interest on it.

A. MADE his will thus; "I give my grandson *Claudius Fonnereau*, when he shall attain twenty-five, £1000 which I empower my executors to lay out in such securities, as they shall think fit; and the (t) interest and income thereof to be for and towards his education as they shall think fit; and also part of the principal to put him out apprentice; the remainder to be paid him when he shall attain twenty-five and not before."

He died before twenty-five, and his father as administrator to him, claimed this £1000 [by petition] as being a vested legacy and transmissible to his representative.

(t) In legatory cases, interest is evidence of vesting, 2d Vol. 263, and the cases there cited.

(1) See Mr. Sanders' notes to this case, 3 Atk. 645. and to 3 Atk. 427. Mr. Cox's note to P. W. 612. 1 Roper on Leg. 116, &c. and *Hanson v. Graham*, 6 Ves. 239, &c.

Against which it was insisted, that it lapsed and fell into the residue ; and the distinction taken, where the time is annexed to the gift, where to the payment. That here it was clearly upon the first part of the devise so annexed to the gift as not to be separated, being no gift without it ; nor does the following part shew a different intent : for as to the placing out, &c. it is only to take care, that it carries interest for somebody ; still depending upon the question who shall be intitled. The direction [119] of the interest for his education makes rather against this claim, as being for the particular and personal use of the legatee, not for his representative : but at least he is not entitled at present according to *Laundy v. Williams*. [2 P. W. 478.]

LORD CHANCELLOR.

The general question depends upon the construction of the whole of the clause taken together ; and this is a very strong case, to make it vested and transmissible, notwithstanding the dying before twenty-five ; which time was not inserted to postpone the vesting the legacy, but the payment. It is true the general distinction, though often said to be a refined one, is established, viz. that a legacy given barely at *twenty-five* is in general not vested, the time being annexed to the substance : but if it be *to be paid* at twenty-five (u), it is vested, being annexed to the execution and performance. But cases upon particular circumstances are taken out of this (x) ; as where interest is given in the mean time, it vests the property of the principal, as the shadow follows the body ; unless there is something else to take off the force of that consequence ; and this case is stronger than that, or than most of those cases ; there being a direction to dispose of part to put him apprentice ; to which a court of equity would compel the executors, it being obligatory on them : and their discretionary power only as to the securities ; its being for his personal benefit makes no difference : the testator considered him as a minor, and therefore that this was most beneficial for his interest : the executors might have taken the greater part, almost to the extent of the whole, to place him out ; which shews, it arises from his property. In the case of the *Attorney General v. Hall* (2), the court said, it was not a bare power to dispose, for he might have disposed of the whole ; and here is a direction very near to the whole of the principal : which can arise only from his having the property ; it was only intended to postpone the personal payment of any thing to himself, because of his incapacity. Upon the whole therefore this was vested : and must be now given to his representative ; for where interest is given, which is given for delay of payment, the *Ecclesiastical* court decrees payment immediately ; but if no interest be given, it suspends the time of payment, till he would have attained that age.

(u) 1 Brown, 103. ante 59.

(x) 1 Vern. 462. 2 Vern. 673. Prec. Chan. 318. 1 Atk. 501, 512. this is only in legacy cases, 2d Vol. 263. 2 Vent. 342. 1 Brown, 191. 268.

(2) 8 Vin. Ab. 103. pl. 50.

BARNESLY v. POWEL, Aug. 5, 1748.

(Reg. Lib. 1747. A. fol. 641.)

Forged will, &c. Issue. Vide Post, 284 (1).

Relief may be against a decree obtained by fraud.

Against a probate obtained by fraud, relief must be here, where the party will be decreed a trustee.

THE bill sought to be relieved against a paper-writing of the 16th October, 1736, purporting to be the will of the plaintiff's father, under which the defendant *Mansel Powel* claimed, and which was not without evidence to support it; although there was strong suspicion of forgery. It was also to be relieved against several acts of the plaintiff since his father's death; such as a decree of the court of *Exchequer* against [120] him, and a sentence in the *Prerogative* court, wherein the plaintiff's consent to establish that will by a *probate* was obtained, and conveyances and assurances made by him.

LORD CHANCELLOR.

I am unwilling to declare my opinion, for fear of some new contrivance. Undoubtedly the whole must turn upon the reality or fairness of the will; for if forged, it explains every transaction in the case; giving credit to all the evidence on the part of the plaintiff; shewing combination, &c. and all this management to be an imposition upon him (y). It is unfit for a court of equity to determine a question of forgery by their own determination of the fact unless where it is very plain, and no evidence to support it; which I cannot say there is not here, so as to set it aside. The only thing I have considered, is, to come at the trial clearly, so as the plaintiff may not be intangled by his acts; and there is enough in the case to set aside every thing of that sort at the trial, and prevent its being made use of; there being a great deal of management, which ought to be discountenanced. If in a doubtful case, both parties come to an agreement, prejudice to one side is not a ground for a court of equity to set it aside; but if forgery appears, there is no real consideration upon the merits: then none of these facts shall be given in evidence at the trial to support the will. The consequence is another consideration, which will arise properly afterwards (z). There are several instances of relief, notwithstanding a former decree, if obtained by fraud and imposition, which infects judgments at law, and decrees of all courts; and annuls the whole in the consideration of this court; as held by Lord *Macclesfield* in *Richmond v. Taylour*. As to the sentence of the *prerogative* court, as at present advised, that will create no difficulty, if the will is found forged; for then the plaintiff's consent appearing to have been obtained by the misrepresentation of that forged will, that fraud infects the sentence; against which, the relief must be here: this is not absolute: but only to shew the tendency of my opinion upon the equity reserved after the trial: for I should not scruple decreeing the defendant, who obtained that *probate* to stand as a trustee in respect of the *probate*; which would not overturn the jurisdiction of that court.

(y) 1 P. Wms. 388. 2 Atk. 324.

(z) Post, 288.

(1) And *Richmond v. Taylor*, 1 P. W. 734.

The issue was directed accordingly; with a special direction in the decretal order, to upon what foundation the jury went, if they found against the will: whether upon forgery or any particular defect in the execution.

[121] ALLEN v. POULTON, October 25, 1748.

(Reg. Lib. 1748. A. fol. 317.)

Sir William Fortescue, Master of the Rolls.

Trust of a copyhold may be devised without a surrender to use of the will. As to another copyhold of which the testator had the legal estate the heir was put to his election. Claimant under will must admit the whole (1).

BLACKBOURN POULTON devised to the plaintiff, his grandson by a daughter, the several copyhold estates by him held of the manor of *Barking*, to hold to him, his heirs and assigns for ever. He had two copyhold estates held of that manor, neither of which were surrendered to the use of his will; and in one of them only a trust estate, it being taken in the name of a younger son since dead; but a declaration was indorsed thereon, that it was for the benefit of the father; yet it still continued in the trustees. He had other copyholds, which he had surrendered to the use of the will, and he had devised several legacies to the defendant, his eldest son.

The bill was to have the possession of these two copyhold estates.

Against which it was objected for the defendant that they pass not by the devise, because there was no surrender; nor was it intended to pass them; they descended therefore to the heir at law, in whose favour the balance always turns in doubtful cases (b). Allowing that in general a trust copyhold may be devised, though not surrendered, yet it must be by particular words, shewing such intent: whereas here, a manifest difference was intended between these and his other copyholds, which he had surrendered; and as to one of them, it did not come within the words: which are only applicable to those copyholds of which he had the legal estate, and which he himself held of the manor: whereas here the trustees were tenants. In the case of the *King's Head Inn* in *Turnham Green* (2), *Banks v. Denshire* (3), which was a copyhold house, three parts in one manor, and one in another, the testator devised all his copyhold estate, which he had surrendered to the use of his will, having surrendered only that which was in one of the manors: and *Lord Chancellor* held, that only should pass.

As to the other copyhold, the defect of surrender should never be supplied in favour of a grandchild. *Kettle v. Townsend, Salk.* 187.

Master of the Rolls.

As to one of these copyholds, the objection of no surrender is of no

(b) It will pass by a will without any witness, the estate passing by the surrender, of which the will only directed the uses. *Post*, 225.

(1) *Vide Cooke v. Holtier*, *post*, 284.

(2) 3 Atk. 8.

(3) *Ante*, 69. *Vide* 10 Ves. 589.

weight (c); because having only an equitable interest therein, he might by the constant rule of this court dispose of the trust without a surrender: it is true, that an intent to pass it must appear; but the words are very extensive, and mean *all* the copyhold held of the manor; and though in strictness of law it is not held by him, but by the trustee, who is tenant; yet, I think, it would be going too far to admit such a distinction here; especially in the construction of a will, although it has been alleged, that the testator was very conversant in making wills; for in common parlance a man might think, what was held by his trustee, was held by him: and the reason of not surrendering might be because he knew, there was no occasion for it: as the law is so, of which every one is supposed conversant. In the case of the *King's Head*, the words are more particular, being a devise of his copyhold lands, which he surrendered: and then the court could not take in lands not surrendered. [122]

The other (d) copyhold stands on a different reason, not being a trust: and therefore a surrender in strictness of law is necessary to make it pass; but if the intent was to pass it, *a person claiming under a will must admit the whole* (4); and the intent is so; being within the general words *held of the manor*. Nor is the objection of his having surrendered other copyholds, and that therefore the intent was different as to this, sufficient to take it out of the devise: and perhaps the intent was to leave it to the option of the defendant, to forfeit his claims by the will in disputing this. Therefore they both pass.

(c) Equity of redemption in copyholds passes by will without surrender, 1 Brown, 482.
(d) 2 Brown, 64, S. P.

(4) Vide *Cooke v. Helier*, post, 284.

HILL v. CAILLOVEL, Oct. 26, 1748.

Post Obit security. Bond by A. in 1720 for payment in six months after his father's death, if he survived, otherwise to be void; the father then seventy, and dies in 1731, A. in 1734: no relief except against the penalty; there being no proof of imposition although suspicious circumstances in it.

Assignee of bond takes it subject to all equity; but time, &c. may vary it.

THOMAS HILL at the age of twenty-four in 1720 entered into a bond to *Isaac Caillovel* for the payment of £520 within six months after his father's death, if he survived him: if not, to be void; the father being then seventy.

The obligee died in 1720, his executor in 1722 assigned it for valuable consideration, for ought that appeared to the contrary, to *Lane*; the father died in 1731, after his death and the death of *Lane*, letters were wrote to the son, demanding it; who did not deny his entering into it, but disputed his knowing any thing of the executor of *Lane*. No action was brought thereon in the life of the son who died in 1734, but afterward application was made to his widow and executrix; and a composition offered, with which she did not comply. An action was brought: and verdict and judgment followed thereon; but before judgment the executrix brought this bill for relief, against the representative at a fourth hand of the obligee, and against the executor of *Lane*, as being obtained from an extrava-

gant young heir, necessitous, and dependant upon his father; and an extraordinary loan under oppressive and hard circumstances. [123] Nor could the assignment alter it; or put the assignee in a better case than the obligee himself; for he must take it subject to all the equity upon it.

LORD CHANCELLOR.

A very strong case for the defendant; it is true, that the rule of the court is, that on a bond from a young heir in life of his father, being extravagant, &c. the court will hold the creditor to strict proof, and either relieve against, or reduce it to the sum, that was advanced; and had this question arisen recently between the original creditor and debtor, and a bill brought for relief, that appearance in the condition of the bond would have made me expect an account from the defendant upon what consideration it arose. Although it is not to be laid down in general, that where a bill is brought for relief against a bond, the plaintiff shall be relieved, unless there is actual proof of the payment of the money; for that would make bonds useless. Then as to the circumstances here, it induces suspicion; but that cannot be certain; for out of humanity and tenderness such a sum might be advanced. Can I relieve without proof of imposition? Why did not the son bring a bill for relief in his life upon the demand against him? For it is not prudent to wait till the action is brought. This is a strong case even for *Caillovel*; but in the case of the assignee for valuable consideration it is stronger. The rule is right, that whoever takes the assignment of a bond, being a *chose in action*, takes it subject to all the equity in the hands of the original obligee: but length of time and circumstances may vary that, and make the case of the assignee stronger: for why was not the bill brought, when the facts were recent (c)? The only relief is against the penalty; to which every obligor coming into this court is intitled. Had the defendant proved less, considering how little the plaintiff has proved, I should be still of the same opinion (1).

(c) Bond given for the enjoyment of a collateral matter, an injunction against an action at law for the penalty will be granted, and an issue *quantum damnificatus* will be awarded; the enjoyment of the object being the principal intent of the deed, and the penalty only accessional to secure the real damage, 1 Brown, 418.

(1) See *Earl of Chesterfield v. Janssen*, post, 2 vol. 125, &c.

REECH v. KENNEGAL, October 26, 1748.

(Reg. Lib. 1748. B. fol. 234.)

Executor and residuary legatee undertakes to pay a legacy not in the will; he shall be bound thereto, not personally, but out of the residue of the assets.

Where but one witness against an answer, the answer must be a positive denial *in toto* and rest singly thereon.

Costs against executor, his answer being evasive and contradictory.

Legacy larger than a debt, a satisfaction for it.

J. KENNEGAL, having made his will, deposited it in the hands of one of his nephews, whom he made executor and residuary legatee, with a ma-

nifest intention of reconsidering it; which he afterward does in the presence of the minister of the parish. *Wm.* another nephew, being then there, mentions his intending to leave him £100, which the testator allows, and desires the other (his executor) to pay it: who undertakes it, saying there would be no occasion to alter the will for that purpose, for that he would pay it, and give his bond or note, if insisted upon. But the testator is satisfied without that, and dies the next day; and three months after the testator's death, the executor upon an occasional conversation with strangers promises to pay.

Against him was the present bill brought by the executors of [124] *Wm.* for that £100, upon the foot of his undertaking to pay it, and by that engagement preventing the alteration of the will by fraud; for which was cited *Thyn v. Thyn*, 1 *Vern.* 296, and *Oldham v. Litchfield*, 2 *Vern.* 506. praying an immediate decree against the defendant personally upon his undertaking and promise after the testator's death; insisting also that a debt due from the testator should not be deducted out of the £100, by way of implied satisfaction; for such implication is always liable to be rebutted by evidence, and here it appeared to be intended as a bounty, although not said so.

For defendant: This is in substance desiring the court to insert a legacy, which is not in the will on the foundation of *parol* evidence only. If it is a fraud indeed, it is to be relieved against; but there is none here: and so, different from *Thyn v. Thyn*, where there was certainly fraud by misrepresentation of the fact. But here it did not arise originally from the defendant; it amounts at most but to a breach of promise, and *valet* at law *quantum valere potest*, and not in a court of equity on the foot of fraud; as in the case of *Whitton v. Russel* (1), July 28, 1739, which was a devise of a leasehold interest to three persons, subject to an annuity of £20, *per ann.* to the plaintiff; the testator having afterward a mind to charge the estate with a farther annuity of £15 *per ann.* for the plaintiff, a consultation was had how to do it: in which *H.* one of the three was present: and it was advised to take a bond from the three devisees for payment thereof, instead of adding a codicil; to which *H.* agreed: but before the bond was prepared, the testator died. This not appearing on the face of the will was not paid; but ten years afterward, a bill was brought against *H.* The question arose on the consequence of the fact, whether it was proper for a court of equity to interpose? One circumstance against it was the length of time; but the principal, that this was breaking in upon the statute of frauds: and *Thyn v. Thyn* was there cited. His Lordship held it a case of a very delicate nature, and ought to be very strong for relief: that there were several cases, in which the court would wish to relieve, but by their rules could not; but that every breach of promise is not a fraud to induce a court of equity thereto; and would give no relief. If it is a promise, why not try it at law? and not come into court of equity, which holds not jurisdiction of *Assumpsit*; for if good, it is good on some consideration, upon which the law would support it. This is to set up a legacy, not proved in the *Ecclesiastical* court; and by encouraging perjury will overturn the statute intended to prevent it; but if there were any foundation for this court to interpose, it must be only out of assets: otherwise it would put the plaintiff in a better case

than legatees, and the defendant in a worse by being bound to pay, if assets are deficient: and if this is in nature of a legacy, the debt must [125] be deducted; the court always considering it a satisfaction, where a legacy is larger than the debt.

LORD CHANCELLOR.

This is a very strong case to give the plaintiff relief, the rule of law and of this court, strengthened by the authority of the statute is, that all the legacies unless in the case of nuncupative wills, must be in writing, and wrote in the will. Then all the rules and arguments laid down for the defendant against breaking in upon the will by parol proof, are true. But notwithstanding this the court has already adhered to this principle, that the statute should never be understood to protect fraud; and therefore whenever a case is infected with fraud, such as the *Ecclesiastical* court cannot relieve against (for they may relieve against fraud in obtaining a will) the court will not suffer the statute to protect it, so as that any one should run away with a benefit not intended. The question then is, whether this is a case of fraud, strengthened by the promise of the defendant? then I am of opinion, that it is. It has been taken, as if the fraud must be on the person, who might have remedy at law; but this court considers it as a fraud also upon the testator; for whom none can have remedy but a person coming here for payment: and here it is plain, and admitted in all the circumstances by the defendant, except just so much as he thought, would intitle [the plaintiff] to a decree against him. But when so far is admitted, it gives credit to the witness, who goes farther; this therefore is not to be compared to the case where there was but one witness against the defendant's answer (*f*); for the answer must be a positive denial *in toto*, and must rest singly thereon. There is a breach of promise; but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will, and comes within the proper jurisdiction of this court as *imposition*. The cases cited, of which kind there are several others, are upon this foundation: nor does this case differ in reason and equity; although that of *Thyn v. Thyn* was attended with other circumstances of aggravation. So in 2 *Vern.* 506 as to the case in 1739, I do not remember it particularly; and all these cases depend on the particular circumstances: but a material difference appears as is stated; the promise there not being made by the executors, but one only of the legatees. The promise there was in direct contradiction to the written will; it is not so here, where the defendant is executor: but I do not give any certain and conclusive opinion thereon. Upon the merits therefore the plaintiff is intitled to the relief prayed.

But as to the question: whether to have an immediate decree personally? First from the nature of the undertaking, I think it does not bind him personally as it would if he had given the note; for such pro- [126] mises must be understood with reference to assets, otherwise men might be drawn in; [*Rann v. Hughes*, judgment in *Exchequer Chamber*, *Trinity Term*, 1776,] for it ought not to operate out of the executor's own estate, binding only to pay out of the testator's. Secondly, as to the promise after the testator's death: I at first doubted if it would not bind him personally; which I would do, if I could: but fear it would be go-

ing too far upon so loose a thing as this promise is. It is no promise. Then there is no consideration arising; the plain meaning being not to bind himself in a bond, but to pay it as a legacy when the year and day should be out, which is all I can infer (g). At law if an executor promises to pay a debt of his testator, a consideration must be alleged; as of assets come to his hands; or of forbearance; or if admission of assets is implied by the promise: otherwise it will be but *nudum pactum*, and not personally binding upon the executor; and this being so soon after the testator's death, the executor might not know the value of the effects.

The question then is, in what order the plaintiff is to come, since it is a decree out of assets; which must be so, as not to break in upon other legatees; which would be turning it into a fraud upon them, by making them abate in proportion upon a deficiency: for that indeed would break in on the statute of frauds. So that this promise by the executor and residuary legatee amounts to payment out of the surplus.

(h) But the plaintiff must have costs personally at this time the defence being a wrong foot; the answer evasive and contradicted.

As to the debt, although I think the cases of satisfaction by implication barely have gone far enough: yet I cannot distinguish this, nor can I take it upon a different foot than if it had been in the will. So it must be deducted.

(g) *Assumpsit* lies against an executor for a legacy, on a promise in consideration of assets; but if the action is brought personally in his own right, judgment can only be *de bonis propriis*. Cowp. 284, 289. Cro. Eliz. 91, 406.

(h) In 2 Vol. 85, executor decreed to pay costs for misbehaviour; and in 1 Brown, 362, he was refused costs, as the expense was occasioned by his own delay, though executor has a claim to costs. Post, 519. 2 Vol. 635.

BINGHAM v. BINGHAM, October 27, 1748.

(Reg. Lib. 1748. A. fol. 154.)

Mistake—Equity relieves against bargains made under a misconception of rights (1).

Master of the Rolls for Lord Chancellor.

An agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will.

The bill was to have the purchase money refunded as it appeared to have been the plaintiff's estate.

It was insisted, that it was the plaintiff's own fault, to whom the title was produced, and who had time to consider it.

Decreed for the plaintiff with costs, and interest for the money from the time of bringing the bill; for though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain [127] mistake (i), such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right.

(i) Ante, 106.

(1) See *Cocking v. Pratt*, postea, 400; and *Ramsden v. Hyllon*, 2 Vol. 304.

PEACOCK v. MONK, Oct. 28, 1748.

(Reg. Lib. 1748. B. fol. 126.)

Deed and will executed on the same day ; the deed held a testamentary act, and as voluntary and void against creditors under the 13 *Elix.*

Parties—Not necessary to make any other than the executor parties relative to the personal estate ; since he sustains the person of the testator to defend the estate for himself, creditors, and legatees.

Where any consideration is mentioned in a deed, and not said for other considerations, you cannot enter into proof of any other : otherwise where no consideration at all in the deed.

Not necessary to make more than the executor party, who sustains the person of testator for him, creditors and legatees.

Donatio inter vivos must be absolute.

ADMIRAL *Lestock*, going to settle his affairs, upon the same day 17th July, 1746, makes two instruments : one he called a deed by way of agreement between him and the defendant *Monk* ; the other he called his will : by the deed he puts £4000 into the hands of *Monk*, to pay to the admiral himself for life, an annuity of £160, and afterwards to pay £1000 a piece to *Peacock* and *Cockburn*, if they survived him : and an annuity of £100 for life to *Mrs. Knowles* his house-keeper, if she survived him : the residue to *Monk*, proviso, that if the £160 annuity be unpaid after any quarter-day, *Monk* shall repay the £4000 to Mr. *Lestock* himself, to be placed out in the names of *Lestock* and *Monk*. By the will he makes *Monk* executor and residuary legatee.

After his death *Monk* made some payments : but discontinued them upon notice of a bond creditor ; apprehending there would not be sufficient to pay that and the others also : which occasioned the present bill by the three persons claiming the benefit of the trust arising under the deed.

Objected, that they had not made the bond creditor a party, who had also filed a bill, and would have a right to say, that nothing done in this case would bind him ; and therefore both causes should come on together, lest there might be inconsistent decrees : nor could even the plaintiff or the defendant otherwise be safe. In general on a demand against an executor, it is not necessary to bring the other creditors before the court, but the executor only who is the proper person to defend, and will be supposed to do his duty. But here the demand is not out of assets, but out of a specific thing ; and it is a mixed cause, differing from the common case ; the executor being contractor in the covenant, and so concerned himself ; and collusion between him and the plaintiffs might be objected ; nor may he be able of himself to make so good a defence ; and ought not to be put thereto without having those parties, who still are interested, and as to whom he is but a trustee.

To which it was answered, that in general it was sufficient for a plaintiff to bring before the court those persons, who could intitle to make a decree in his favour : although there are several cases, where it is necessary to bring every person who will enable the defendant to

[128] make a defence ; which is done here. The person objected not to have been made a party, is only in nature of a common creditor, and then if there are any other debts, the plaintiff will be bound to make all, even simple contract creditors, parties ; which would render it .

impracticable to come at a debt in this court ; and is the reason, that in the case of executors, the court acts opposite to its own rule in other cases of making all persons interested parties.

Lord Chancellor would not determine this question, till he heard the merits.

The plaintiffs offering to read evidence of the services done by them to *Mr. Lestock*, as a consideration of the deed, it was opposed, because no consideration was mentioned in the deed to warrant the reading.

LORD CHANCELLOR.

This proof ought to be read : the consequence afterward must be considered, compared with the nature of the deed ; it differing from the common case upon which the objection is founded : for to be sure where any consideration is mentioned, as of love and affection only, if it is not said also *and for other considerations*, you cannot enter into proof of any other : the reason is because it would be contrary to the deed ; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed. I will suppose two cases : one at law, before the statute enabling the bringing an action at law on promissory notes, without proving a consideration. These notes were frequent without saying any consideration ; yet before that act a consideration must have been shewn at law : and it might have been there said, it was contrary to the writing. The other is a case in this court : suppose a father has a sum of money, being a gift to a child from a collateral relation, in his hands ; and makes a bill of sale of goods, or declares a trust for that child, without saying for love or affection, or mentioning any consideration at all : upon a question here the child may shew, this gift was in sanction for what was in his hands from the collateral relation.

The services proved were, the assistance given to *Mr. Lestock* by two of the plaintiffs, in making his defence upon his trial by a court *martial*, and the pains and labour they were at ; and that *Knowles* the other plaintiff nursed him in his illness. An answer was also read, in which he acknowledged the services of the plaintiffs, one of [129] whom was his nephew ; and that he would settle his affairs, and make a provision for them.

And it was argued for the plaintiffs, that they had a legal claim in *Lestock's* life. The deed is fair, he might dispose of his property ; nor will the reserving an interest to himself make it otherwise. If a creditor is satisfied to take the debt in a way most for the debtor's ease, other creditors after his death cannot set aside this composition : which shews it not to be a testamentary act. Suppose, instead of paying it to *Monk*, he had paid it to the plaintiffs to whom he was indebted, upon their paying him the interest for life : it would be good, and not applicable to the debts at large ; otherwise it would be out of the power of a debtor to compound, or do any thing but directly pay the money down. It ceased to be his estate, and though by the proviso it might come to his hands again, yet he could not appropriate it to other purposes than in the original engagement. This is not such an act, as the rules will not warrant. The statutes of fraud take not in transactions of this sort ; all the acts of parliament proceeding on a foundation of aliening with a view to defeat credi-

tors. If a debtor, instead of paying a sum of money, lays it out in purchase of land, and agrees with the creditor to limit it to himself for life, remainder to the creditor in satisfaction of the debt; it could not be defeated. Nor is there any instance where a purchase shall be looked on within any of the acts mentioned in 13 *Eliz. Fletcher v. Lady Sidley*, 2 *Vern.* 490. The plaintiffs had at the time a claim against him, which his death cannot alter; and assets are consequential to the right the party had in his life. Its not being revocable in its own nature, which is the criterion of a testamentary act, shews it not to be such; nor was it in contemplation of his death, for certainly just before his death he could not dispose of his goods; but he might have made them this recompence immediately for their services; which would not then have been rescindable or fraudulent; nor could the court follow it into their hands. Then the postponing it till after his death, which was done out of affection to him, as the plaintiffs might have brought an action and recovered damages, is far from making it fraudulent. The deed, though not expressed to be for these services, yet from the proof read appears to be so, and to be accepted by the plaintiffs in recompence, by their not demanding any other; nor will the court weigh it with exactness, or send it to a jury to see whether the consideration be adequate or not.

For the defendant; The question is, whether this is to be considered as assets as *Lestock*, and so charged with debts in general: or as a specific thing, in which the plaintiffs are interested, and have a demand against *Monk* in his own capacity? The deed imports on the face of it, to be without consideration as to the plaintiffs, though as between *Lestock* and *Monk* it is on consideration. Then the plaintiffs call in aid the

[130] services; but the value thereof does not appear; the evidence not stating it, nor is it suggested by the bill; and though the plaintiffs were intitled to bring an action upon the case for them, that is not sufficient; for the plaintiffs want to have a specific thing for the purpose by contract of the party; for which it is necessary to shew, that such was the intent, and that it was accepted by the plaintiffs as a satisfaction for the debt due for those services: which will not be presumed. When that acknowledgment by Mr. *Lestock* was made does not appear: so that it may be applicable to any other intent to make a provision for the plaintiffs; but making a provision is different, and imports a bounty, and makes against the plaintiffs. Supposing then, no consideration; the question is, whether it is not the property of the testator, so as to be assets? The settling of an estate without consideration makes it void as to creditors; though personal estate may be given away in one's life, yet must the possession be parted with: for the retaining that will be considered as a fraud in law or equity; and here he himself was to receive the benefit of this contract during life; the plaintiffs only claiming a reversionary interest afterward; and though it is not strictly under a testamentary instrument, yet it is to have the effect of such, only that it is not revocable; and yet on a contingency it might again be his estate; and there is no case where the party on a disposition has retained the interest in his life, that the court has held it not to be assets. As in the cases of bankruptcy, and on the custom of *London*; for a father might give what he will to a child without fraud; but if he retains it himself, it is a fraud upon the custom. As on a bond to provide for a child after his death; the child may have

the benefit out of the testamentary part; but not against the widow or children. So 2 *Vern.* 202, and *Combes v. Ellin*, March 2, 1747, where an old freeman purchased a term for years after a stranger's death with his own money in the name of himself and his wife jointly, and died. The children brought a bill, to have this leasehold distributed as part of his personal estate; and the court was of that opinion, and that it should take place against the wife's survivorship; for being purchased with his own money, it should be the same as if it was for himself for life, and afterward to his wife; which is a direct answer to *Fletcher v. Lady Sidley*.

LORD CHANCELLOR.

That case in 2 *Vern.* 490. was only the inclination of the court on the argument of counsel; and it would be dangerous to allow the arguments, which are there; and as to the cases on the custom and bankruptcy, they are not applicable: standing on particular reasons.

All the questions arising between the parties fall under two [131] general heads. The objection by the defendant for want of parties; and the true merits of the plaintiffs demand.

As to the first, I was willing to postpone it, till I went into the cause on the whole merits: because the case is particular in its nature; the person who is covenantor, being also executor; and the rather, because it may save expense to the parties, and probably prevent further litigation in the other suit. The objection does not prevail; and if allowed, might make an inconvenient precedent. The true question is, whether the property arising under this deed, and benefit of this trust, must be considered as the plaintiffs property, or part of Mr. *Lestock's* personal assets? for to that it will result: that is, part of the produce of his personal estate so disposed of as not to bind creditors. Then who is the proper person to make defence, and to insist that this is not such a disposition, but the executor? It is said that still the creditors are interested; the executor as to them being but a trustee, and ought not to be put to make that defence without having them parties. Whether fewer or more creditors makes no difference; for the court must go on some rule; and the question is, whether it is necessary to make more than the executor party. It is truly said for the plaintiffs, that if bound to make one, they are bound to make all, even simple contract creditors, parties: they having an equal right to controvert that point; for if what the defendant insists upon is right, the plaintiffs can no more claim in prejudice of one, than the other: which would be a strange rule, and must then be always done. These cases often arise; and the direction is to take an account, &c. and all the creditors to come before the *Master* to prove their debts; which if they do, and it is objected, that they are not creditors for valuable consideration, that question might be entered into there, and come before the court upon exceptions. If indeed there is a bill by a single creditor or person claiming part of the estate, as it is here, the court at the hearing the cause will and ought to determine it: but that is not necessary in all cases (*k*), and

(k) In a bill against the executor by creditors or legatees, it is not necessary to make the residuary legatee a party, though Lord *Loughborough* thought, as being interested, he ought to resist the demands, and that all parties interested ought to be before the court, but the practice being said to be contrary, it was so decreed. 1 *Brown*, 303. 1 *Eq. Ab.* 73. pl. 13. 2 *Brown*, 87.

shews it not necessary to bring all before the court; the executor in all cases sustaining the person of the testator, to defend the estate for him, creditors, and legatees: but if collusion, a particular case must be made of that (1). But here the objection and defence made, shews no collusion between the executor and the plaintiffs; and there is a plain answer to the executor's not being able to make so good a defence, *viz.* that here he is also contractor with *Lestock*, and party to the transaction.

As to the next point, on the merits; I have been willing to give great attention to find foundation to decree this demand for the plaintiffs, as a demand for valuable consideration, without incurring the danger of a precedent against the rules of law and of this court particularly.

[132] The services were probably very beneficial, and deserved a reward; but upon the whole circumstances, I cannot be so satisfied as to allow this disposition to prevail; which might chalk out a way, whereby any one, who intended a bounty to a particular creditor, might at the instant of making his will do that, which would amount to a legacy in its nature, by severing part from the rest, and the other creditors go without satisfaction. The observation is right, that this deed is in two respects, being for valuable consideration with respect to *Monk* the grantor; but not as to the plaintiffs: for I am very doubtful, notwithstanding the merits of the services, whether they were such, as would intitle either of the plaintiffs to an action against Mr. *Lestock*. There is only proof of the facts done; but of no promise to recompence: what demand could *Knowles* have against him? I cannot presume that she was paid no wages, or that he intended to pay her merely by giving this annuity afterward, if she survived him; and the acknowledgment in the answer is like a man providing for relations; not paying a debt but a bounty out of gratitude for services performed: and the words themselves only import that: he has reserved exactly the interest at four *per cent.* for himself for life, giving only a contingent interest to the plaintiffs; if they survived him; which is a strange way of paying a debt. It is true by a particular contract proved, a creditor might accept such an interest by way of accord and satisfaction; but that should be proved. Supposing more proof that these services were such, for which an action could be maintained: it was not accepted as a satisfaction: nor any contract binding to such acceptance, which ought to be in all cases of this kind; that is, supposing it a debt: so that it is merely voluntary in consideration both of law and equity, as to others claiming for valuable consideration, whether specifically, or as general creditors. Then as to the consequence, and whether it could be good against creditors: it depends on its being fraudulent or not. I do not mean as to the intent, (although there is something like that) but a colourable fraud against creditors in the nation of this court; and I am of that opinion from the act 13 *Eliz.* which includes all goods and chattels: and though money has no ear-mark, yet if in trust, it is another matter; for though it be not the specific £4000 which was paid, yet it is the profits thereof; which is equally within the words of the statute; preventing creditors from a satisfaction for their debts by taking part of the debtors property. But there is something bringing nearer to those cases, which have been determined without any difficulty; that if their is a power of revocation in such a deed, it is a constant evidence of fraud: and here is

(1) See before, p. 106, in *Newland v. Champion*.

that, which amounts thereto by the *proviso*; putting it in the power of *Monk* to enable *Lestock* to defeat it: or might be done by collusion, to which the only answer attempted to be given is, that though it would defeat *Monk's* interest, still the trust for benefit of the plaintiffs would subsist. But what remedy for that trust could the plaintiffs have against *Lestock*? because it is not a contract for valuable consideration; for then they might come here for a specific performance; but being merely voluntary and *nudum pactum*, upon a bill brought here it must be dismissed. And there is one thing that looks like such an intent; that on its being repaid to *Lestock* for default of *Monk*, it was still to be placed out in the name of *Monk*, making him trustee again. But abstracted from the statute, and although it never had been made, upon the particular circumstances, this would not be binding on creditors in this court. *Monk* being both executor and contractor in the deed, and both instruments being done at the same instant (as it must be taken, being on the same day) it speaks the whole to be a testamentary act. Then why were they divided but to give the plaintiffs a preference to other legatees or creditors? In several cases the nearness of one act to another makes the court take it as one, so that it is a testamentary act; though not strictly so, because not revocable: yet I have shewn how it might be revoked. And wherever a court of equity finds such a turn given to a transaction to defeat creditors, reserving the benefit of it to the person himself, the court will be very nice to find out a distinction for creditors. It is true indeed, that a man may give money in his life, as he pleases, without creditors calling to an account, or having it refunded: but then he must absolutely depart with the benefit of it during his life; otherwise a court of equity will inquire very strictly into it. So here there is no parting with the usufructuary interest; and it shall not prevail against creditors even by simple contract, but against residuary or other legatees they are intitled by their specific lien on it.

But then a question arises among the plaintiffs themselves, whether *Knowles* shall abate in proportion with the others? For an annuity has been determined to be a specific legacy and not to abate with pecuniary. But here the legacy is a sum of money, and the annuity in trust thereout, and to come out of the whole.

Reserve that question.

BUTTERFIELD v. BUTTERFIELD, Oct. 29. 1748.

(Reg. Lib. 1748. A. fol. 75.)

See the judgment. Post, 154.—Remote limitation—Devise of £400 to be put out on good security for *T. B.* that he may have the interest for his life, and for the heirs of his body: if he die without issue, then over. The whole property vests in the first taker, and the limitation too remote.

Judgment in a cause heard by consent, reversed on appeal (1).

Appeal from the Rolls, where it was heard as a cause by consent.

THE bill was to have a question determined, which arose on the will of *T. Butterfield*, viz. "I desire that £400 should be put out on good security for my son *T. Butterfield*, that (1) he may have the interest of it for his life,

(1) 2 Vol. 263.

(1) See *Harrison v. Ramsey*, post, 2 Vol. 448.

and for the lawful heirs of his body: and if it should so happen, that he should die without heirs, it should go to my youngest son John Butterfield, and the lawful heirs of his body.

[134] The question was whether *T. Butterfield* should have it as his own property absolutely, or only the interest for life; and afterward for the benefit of his children if any; with a limitation over to his brother; but the brother gave up his interest.

And it was argued to be an established rule, that where personal estate is given for life, and then to the indefinite heirs of the body, there being no recovery by which the intail of personal estate can be barred, the first taker may dispose of it as he pleases, and though a personal cannot descend as a real estate, yet if it was intended to go in that course of descent, which would be an intail of land, the first taker has the absolute property, and remainder over cannot take effect. Then here it plainly was meant to the heirs of the body, as heirs; which cannot be confined to any particular child or children by purchase; for then the instant they were born, it would vest in them, and their representative would take, which could not be so here: Nor could he mean children living at the time of the death, for if such child died, leaving issue, he meant the grandchildren should take. In *Lord George Beauclerc v. Miss Dormer*, June 17. 1742 [2 *Atk.* 308.] a distinction was contended for, that where a real estate was limited after a death without issue, it should be construed indefinitely: but if a personal, the court would suppose it to mean at the time of his death; but his *lordship* held, that in case of a personalty, it was after an indefinite dying without issue, and too remote. Was this question upon a limitation of real estate, it would not bear an argument, since the late determination of *Colson v. Colson* in *B. R. Bagshaw v. Spencer*, Post, 142. so that if this was a real estate, it clearly would be an estate tail.

LORD CHANCELLOR.

My apprehension is, that if this was of land, it would be an intail (*m*); and that therefore it vests the whole property in the first taker; but there is one circumstance to differ this from the common case, viz. that here is no gift of the £400 to *J. Butterfield*; for then I should clearly have thought him intitled to the absolute interest and property thereof, and the devise over void, as a devise of a personalty after such a limitation as would be a clear intail of lands, and too remote a contingency: because *heirs of body* import *ad infinitum*, if nothing to restrain is superadded: and in those cases, where something is superadded, both courts of law and equity have with much difficulty come into a construction to restrain it to issue living at the time of the death; as the first words import *ad infinitum*. In the devise over to *T. Butterfield*, where it undoubtedly must vest the absolute property, the testator has used the same words, except for life, leaving no reversionary interest or chance to his executor or residuary legatee. Then why should it not be so in the other? In *Miss Dormer's* case, I held a devise of a personalty to one, and the

[135] the heirs of the body generally, vested the absolute property in

(*m*) Where there is an express limitation of a chattel by words, which if applied to a freehold, would create an *express estate tail*, the whole interest vests absolutely in the first taker, and the limitation over is too remote; but where there is no express legal limitation, the court will consider the intention of the testator. Per *Ashhurst, Jus. Darnford and East*, 596.

him, and no devise over could be, if nothing more. The only thing creating a doubt is, that here the interest only, and not the thing is devised to him; unless the word *for* imports a trust for him, which is the same as a bequest to him, it is giving him the interest for life; which in the *civil* law is called the usufructuary benefit; and whether express words of gift, or the law construes it so, makes no difference*.

(n) Let it stand over: and in the mean time I will look into the case of *Miss Dormer*.

I am always more jealous, where causes are argued on one side only; and though *J. Butterfield* gives it up; yet if a right is in the children of the first taker, the court is bound to take care of it, as much as if the other had insisted on it.

* The case of *Peacock v. Spooner* had been cited; which *Lord Chancellor* said he knew not what to make of; nor of the opinion of the Judges, who were extremely divided, as appears from the minutes, and that *Lord Harcourt* disallowed it.

(n) See post. p. 154.

OKE v. HEATH, November 4, 1748.

(Reg. Lib. 1748. B. fol. 215. entered "*Oke v. Gill*.")

A wife having power to appoint £4000 to any of her kin; and, for want of appointment, to go according to the statute, appoints it by will to her nephew, "*upon condition*" (1) that he paid his mother an annuity of £100. She then bequeathed to her niece S. *all the rest and residue of what she had power to dispose of*. The nephew dying in her lifetime, the appointment as to him was void, *but not so as to the annuitant* (2), and the remainder was held to pass by the above residuary bequest.

Appointment by will under a power, void by the death of appointee in life of testatrix.

And if a power is professed to be executed *by a will, such instrument must have all the qualities of a will*.

Legacy paying an annuity; legatee dies in life of testator, the annuity still subsists.

On the marriage of *Elizabeth Pasimer* with *Sir William Smith*, £10,000 were by articles *July 17, 1718*, vested in trustees, to be laid out in the purchase of lands, to be settled on the husband and wife for their lives: then for the issue, if any: if none, a term of five hundred years was created, that if the wife died in life of the husband, the trustees should raise and levy £4000 for such person or persons, as are or shall be her kin, and for none other whatsoever, as she by any deed or will, or writing under hand and seal purporting, or in nature of a last will, shall, notwithstanding coverture, direct, limit or appoint, to be paid within twelve months after due, in such manner as she by the said deed, &c. should, &c. and for default of appointment, to be paid and divided among such of her kin as by the statute of distribution would be intitled to her personal estate, if she died unmarried and intestate. But if the money was not laid out in lands, then after payment and deduction of the £4000 to such as she should ap-

(1) The words in R. L. are as here, *upon "condition that he paid."*

(2) See *Wigg v. Wigg*, 1 Atk. 382, and *Hills v. Wirley*, 2 Atk. 605. This latter case is the one cited in the Report, p. 136, as decided 6th July, 1748.

Burnel v. Holgrave, mentioned pp. 137 and 140, as in Eq. Ca. Ab. 296, is imperfectly reported there. Vide 2 Vol. 80.

Upon the distinctions between *trusts* and *powers*, vide in *Brown v. Higgs*, 3 Ves. 561 470, &c.

point as aforesaid, the residue and surplus should be paid to her husband.

Having no issue living she on the fifth of *May*, 1743, makes a will, and reciting her power she directs, limits and appoints the £4000 to be paid to her nephew *Wm. Gill* for his own use and benefit; but in consideration thereof he to pay to his mother an annuity of £100 *per ann.* [136] during her life, for her separate use, and to enter into a bond with a penalty for payment thereof. And all the rest and residue, of what she had power to dispose of, she gives to her neice *Susan Gill* after paying some legacies thereout.

William Gill dies in her life-time; she dies; her husband surviving.

The plaintiffs were part of her next of kin, claiming under the articles by the statute of distribution in default of appointment, by the death of the appointee in her life.

A cross bill was brought by — *Gill*, father of the appointee, as representing him, and also for the arrears of his wife's annuity, who was dead, and by *Heath* and his wife, *Susan* claiming the whole by the residuary clause.

For the plaintiffs it was argued, that *Susan Heath* was not an object within the articles; not being in *esse* at the time of making them; and the articles only describing the persons, the proportions must be now settled by the court; which will make an equal distribution *per capita* and not *per stirpes*, as held in *Thomas v. Hole*, Cases in the time of Lord Talbot, 251; where a personal estate was left to be equally divided among relations: and decreed, that the statute of distribution should be the rule as to the persons to take, but that they should take *per capita*. So in 1 *P. Wms.* 343. the appointment was complete; so that it could not be intended, that this £4000 should fall into the residue, out of which legacies are also given.

Then as to the claim of — *Gill*: where a legacy is given to *A.* and out of it pay to *B.* though *A.* dies in the life of the testator, it will not defeat the legacy to *B.* But that is, where the fund given to the first taker, is made the fund, out of which the second legacy is to arise; as held by his Lordship, July 6, 1743. [2 *Atk.* 605. S. C.] But here it is different, being an absolute bequest to the nephew; and in consideration thereof a direction to secure an annuity; but independent of the fund; which therefore is not liable thereto. Where the second legacy is given by way of trust out of the first, or of remainder, although the first fails, the other will subsist; but not where it is by way of condition: which distinction was taken at the *Rolls*, June 7, 1739; where the devise was to a wife, desiring she would leave it to relations: and so different from the case in 2 *Vern.* 116. where the legacy was annexed to the other on condition, as it is here.

And further, as to the residue; where a personal legacy is given to *A.* and the residue to *B.* though the first fails, the residue will take it in, from the intent; sweeping in every part, which by any act whatsoever could come within it: but no such intent is here. If a particular farm [137] is devised to *A.* in fee; the residue to *B.* *A.* dies in life of the testator: it was settled lately in *C. B.* that the residue should not take it in.

For — *Gill* it was said, the testatrix has executed her power, although

that execution during her life is revocable; arising from the nature of a will, by which it was appointed with that intent. The question is, whether that contingency, which depended on her nomination, being executed and put an end to by her, it was such an interest, as is transmissible to the representative? The general objection thereto is from its being a testamentary disposition, and like every other lapse; which is so, if mere testamentary. But this not properly a legacy; the settlement having entirely disposed of it to such of her kin as she should appoint, leaving her only a naked power and no property; so that she could not give it by will to any other than those she was confined to: and the power operates as if the execution thereof had been in the original instrument; and if so, notwithstanding his dying in her life, it will go to his representative. As in the case where one devised all the residue of his personal estate after death of his wife to be divided among *A. B.* and five relations: the five relations died in life of the wife; their representatives were notwithstanding held intitled. The reason of a will's passing no right till the testator's death is, from the notion the law has of its passing part of the testator's property; but that is, when the person takes only under the will. There is no inconsistency that the representative should take where the ancestor could not: as in *Co. Lit.* 378. *b.* a gift to *A.* and *B.* remainder to the heirs of him who died first. Suppose an estate for life, remainder to *B.* on a contingency, and *B.* dies before it happens; his heir may take afterwards, when it happens. Suppose it was in trust to *A.* if she appointed it: it is contingent, and if she appoints after his death, it becomes certain, and descends to his representative. So in a lease to *A.* for so many years as *B.* shall appoint. So if given on a chance, then the surviving or not surviving the testatrix makes no difference. And *Burnet v. Holgrave, Eq. Ab.* 296, is in point (1).

But supposing him not so intitled; the annuity to his wife was not lapsed by the death of his son; but had continuance during her life, so as to be a charge on the £4000. The annulity of a legacy will not annul a charge thereon, being as another legacy, 2 *Domat*, 192. And notwithstanding the provision of the bond, the mother would have a right to secure it on the land; if not, it is a condition; for non-performance of which the court will lay hands on it, and make him a trustee; as in *Wig v. Wig, July 2, 1739*, where was a devise of real estate, on condition to pay £90 to three grandchildren equally to be divided between them. The devisee on condition died in the life of the testator; and though it was void [138.] as to him, it was held, that the £90 was a charge on the land, and should be paid.

For Sir *William Smith* it was insisted, that there having happened a loss on some of the funds, on which the £10,000 were laid out, that loss should be borne by the whole, and not by the residue above the £4000, according to the maxim, that where there is a loss to several parties, standing in the same circumstances, it shall be borne equally; unless there is some special agreement to the contrary: as in *Chambers v. Chambers, Eq. Ab.* 115.

LORD CHANCELLOR.

There is something particular in this case; which ought to be taken

(1) Cited p. 140, *postea*; and 2 Vol. 80.

notice of, *viz.* the manner of bringing on the cross bill; being by two different sets of parties making different demands against one another, and by different counsel. Had it come only upon the cross bill, it should have stood over, to have one of them made a defendant, in order to convert their distinct interests; but the original bill, to which both are made parties, makes the hearing it in this manner regular, and that a complete decree may be made thereon.

The questions as to the rights of the parties are several; but all relating to the £4000, whether the appointment to the nephew be good, or become void by his dying in life of the testatrix? If void, then whether the £4000 or any part of it, belongs to the plaintiffs as some of the next of kin of the testatrix, or goes to Mrs. *Heath* by the residuary clause? Then as to the annuity of £100 given by the will in consideration of the appointment. Then as between all the parties claiming an interest, and Sir *William Smith* in respect of the loss happening on the gross fund.

As to the first: I am of opinion, notwithstanding the reasons and the authority pressed upon me, that it is void by the nephew's death in life of the testatrix; *first from the nature of the articles and intention of the parties*; which was to reserve part of her fortune subject to her disposition, if she died in her husband's life: but having it in contemplation that it might be kept in money, if they pleased, in that case there is a distinct particular trust; the view being plainly to give her as much power to dispose of or leave it behind her to her own kin, exclusive of her husband, as if she was unmarried at her death. They rightly considered, that if they only gave her power to dispose of it, the husband might overturn it; or if she died without disposing, it would go to him: or if it was to her, her executors or administrators, he as administrator would be intitled to [139] it. To secure it therefore against him, and against accidents also in all events, that she might not be induced by good or ill usage to give it to him, she was limited as to her power, to give it to her kin, and to prevent accidents they provide for a direct intestacy. As to the observation that she was confined to give it to such of her blood as were in being before the marriage, that is not the construction of the articles; the words, *or shall be*, import the contrary; it meant such as shall be derived from the stock, in opposition to the kindred by marriage. This view being remembered, will go a great way to give light to any doubt afterward. Then the appointment by death of the appointee becomes void; for though it arises under a power, it is a testamentary disposition, and this a testamentary case (1). A married woman may, by agreement before marriage and with the consent of her husband, make a will, which is good in the *Ecclesiastical* court, and may be proved there. This was a power over her own property, and which might be so in one event absolutely, if she had survived her husband, and part of the ancient dominion which she had over this money. She has executed her power by will, and called it so throughout. The whole frame is testamentary: and plain declarations to that purpose; and although this arises out of her power to make a will, and it is a general notion of law as to powers, that any taking under the directions of the will, take under the power, in the same manner as if their names were inserted there; yet they must take according to the nature of the power and instrument taken together. I allow, that if she had

(1) Vide *Duke of Marlborough v. Lord Godolphin*, post, 3d Vol. 61, 79, &c.

executed her power by deed or writing, the representative of the appointee dying in her life would take thereby: but not if the appointment was, in case he survived her (1). Then she executing her power by will, it must be construed to all intents like a will; the conditions of which are, that it is ambulatory, revocable, and incomplete till her death; nor can any one dying in the testator's life, take under it. Then a person, married or not, appointing by will does the same, as if it was, in case the appointee survives; from the nature of the instrument, which every one is presumed to know. As to its being said, that the appointing by will was only with intent to leave it in her power to revoke; how can I divide it, or say, she meant one quality of a will more than another? She might very sensibly mean both; for though she might have a regard for her nephew, she did not know who would be his executor or administrator. That would not be a sensible intent: nor could it have had its effect; for if the executor was not of kin, he could not take, unless as representative. The most natural person was the father of the nephew, whom she could hardly intend; for what she has given to his wife is exclusive of him. This indeed is not an argument of weight, the foundation of my opinion being, that wherever there is such a power to a married woman, which she executes by will, it is subject to all the qualities of a will: which manifestly differs it from the cases of any other writing or deed, which would be com- [140] plete, and not revocable; and then it must vest. It is said, the matter of this appointment is not testamentary, partaking of real estate, and not to follow the rules of law in personal estates. But abstracted from the power, it is clearly otherwise in its nature; if laid out, it would be a term, which is a chattel; if not, it would be money. Against this reasoning the principal thing insisted upon is the case of *Burnet v. Holgrave* (1); which indeed is a very particular and extraordinary case: and such as, I doubt, if it would be so determined now; however it appears by the *Register* to have been a cause by consent, and not adversary; which takes off greatly from the weight of the opinion there, proving it to have been probably sudden and without consideration. But taking it as it is, there are several differences: first the wife there by marrying a second husband, had disabled herself from making a will; nor is the power given to her to be exercised during coverture; therefore it could not be a will but must be considered as a writing under hand and seal only: and then the determination may be right; but that is nothing to this, which is by a will properly proved as such. But suppose the court took it as a will, or a writing in nature of a will: the appointment there was not personally to the husband only, but the executors or administrators, and on trust to pay thereout. It is true that in general, the words *executors* or *administrators*, are understood as representatives only; but not always; as in cases *per auter vie*, executors or administrators take not as representatives of the first taker, but as new special occupants newly named in the will or deed; and if they took so as to be further persons taking the trust, in that light it is different. And the court rather did this in support of the trust; one of the *cestuy que trust*, for whose benefit it clearly was, being then living; nor can the *cestuy que*

(1) 2 P. Wms. 624. 2d Vol. 75, 612.

(1) It is imperfectly reported in Eq. Ca. Ab. See post, 2d Vol. 80.

trust be defeated by the death of the trustee in the testator's life. The words are, that the court took it an execution of a trust; which is not a *misprint* instead of *power* (1); and imports the husband, his executors or administrators, to be barely trustees. Another thing in support of that determination is, that all was come back to the wife herself; the husband to whom and his executors she had appointed, dying in her life, and making her executrix: these particular circumstances make it no authority to govern the present case; but at most it is but a single case, and contrary to the general reasoning which I have gone upon.—*Gill* therefore cannot take this £4000 as representative of his son; by whose death in life of the testatrix the appointment to him lapsed and determined.

The next question is, whether, on its being void, the £4000 or part of it, shall go to the plaintiffs as some of the next of kin, or to Mrs. Heath by the residuary bequest. *On the whole I am of the latter opinion, on the true intent upon the articles and the will.* If this is testamentary, it must be so throughout; otherwise it would be contradictory; but my particular reasons are these. The general views of the parties above-
[141] mentioned must be remembered. If it goes among the rest of kin in default of appointment, it must be according to the rules of the statute as to the proportions also, so as not to take *per capita*; and I must say, she has died absolutely intestate as to this sum. But how to say that of a person, who made a will, by which she has given the whole, I cannot conceive. There is indeed a plain difference as to the will of personal and real estate; in personal it speaking forward; and taking in all which accrued from the making till the death: it is otherwise of lands, which pass only such as the testator was seized of at the making. And so I take the resolution of *C. B.* to be; that on devise of a farm to *A.*, and his heirs, and all the residue to *B.* if *A.* dies in the life of the testator it shall not pass into the residue; which point was much litigated in *Goodright v. Opey*, wherein the court of *B. R.* was divided; but I shall not dispute that determination; it depending on the rules and nature of real estate, and not as being a specific thing: for no doubt but a specific bequest would in such case pass into the residue. So that the residuary bequest amounts to an appointment of the £4000. All cases of lapsed legacies, whether pecuniary or specific, are of that kind, that they shall fall into the residue (2). This therefore being testamentary, must follow the same rule, as any other legacy would. But it is said, there is something particular here; she being limited as to the objects: which would be a good objection, if the residuary legatee was not one of the kin; but she is within that description. Suppose the testatrix had said, all and every thing I have power to dispose of by any of the powers in me vested, I give to my niece *Susan*: it would be a good disposition of the £4000 as well as every thing else: then why will it not do in the residuary clause? As to the objection, that she had made a complete appointment before, and could not intend it should fall into the residue: if the appointment was complete, there is an end of the plaintiff's whole claim which is on its being incomplete. Another objection is, that the residuary bequest did not intend to take in this £4000 from her giving something out of it, to which the £4000 are not liable; which arises from the words *paying*

(1) Vide in *Brown v. Higgs*, 8 Ves. 561, 570, &c.

(2) Vide post, 322.

thereout; but that is answered by the fact: it being admitted, that she has not made a complete disposition of all her other funds: so that it is giving the remainder of two funds upon condition to pay out of one; over which she had power to make such disposition.

Then as to the arrears of the annuity of £100, directed to be paid to the mother of the appointee: by his death in the life of the testatrix, it is said to become void, and nothing but a gift on condition, and not a direction to pay out of that sum. But I am of opinion, that it amounts to the same, from the words in *consideration thereof*; as was held by me in the case cited: and in all these cases they are considered as charges on the estate, notwithstanding the bond; that being only the future care of the testatrix to secure it. It is therefore a subsisting [142] legacy, and the arrears must be paid by *Heath* to ——— *Gill* the representative.

As to the loss; it must fall upon the residue above the £4000, which is not to be burthened with any part of it. Had lands been purchased and settled according to the first trust, and afterward fallen in value or been partly swallowed up by an inundation, still the £4000 must be raised, and the owner of the inheritance can have no right against *cestui que trust* of the term, to say he should bear part of the loss. The rule then must be the same, although it is not laid out in the land, but in securities. The direction as to that is very particular and express, that after payment and deduction of the £4000, the residue should be paid to her husband; and the general reason of this is unanswerable; holding equally with regard to personal estates: that the owner has the chance of increase of value by accidental advantages; no part whereof would have gone to those intitled to the £4000. Then the constant rule is *qui sentit commodum sentire debet et onus*. Against this there is only a case cited in *Eq. Ab.* 115. which I do not remember. The cases there are sometimes uncertain; but that case arose in the year 1720, and followed the extraordinary rules, which from the necessity of public affairs were then set up (1); and which will not serve for general precedents or hold throughout: nor does it come up to the reason of this; for in cases of provision for children, the court make a liberal construction: but this is not such a case; no part therefore of the loss falls on the £4000.

- (1) The misfortunes occasioned by the South Sea bubble.

BAGSHAW v. SPENCER, November 12, 1748.

(Reg. Lib. 1748. A. fol. 152.)

On Appeal from the Rolls.

S. C. 3 Atk. 570. 577.—Devise.

Limitations apparently legal as uses executed, held to be trusts, from the purposes to be answered, by a preceding devise to trustees for payment of debts, &c. Question as to whether an estate for life, or in tail (1).—*Garth v. Baldwin*, Post. 2 Vol. 646.

Second point.—Whether consistent with general rules. 1 Co. 104 a.

Third point.—Whether the words can be departed from.

BENJAMIN ASHTON, 7th Sept, 1725, devised all his manors, lands, &c. to

(1) See per Lord Thurlow, C. on this case, 1 Bro. 217. 221. 222. and Fearn's Cont. Rem. 166. 207. 211. 215. &c.

five trustees and their heirs, upon trust, that they, or the survivor of them, or the heirs of the survivor, should out of the lands, &c. by the rents, issues and profits, or by sale or mortgage of the whole or so much as should be necessary, raise so much as should be sufficient for the payment of debts, legacies, and funeral expences; and then, as to one moiety, upon trust and to the use of his nephew Thomas Bagshaw for life, without impeachment of waste; then to trustees for and during the life of Thomas Bagshaw for support of contingent uses, but to permit him to receive the profits for life, and then to the heirs of his body lawfully begotten, or to be begotten; and for want of such issue, then to his nephew Benjamin Bagshaw for life, without impeachment of waste; then to trustees to preserve, &c. in the same manner, then to the heirs of his body; remainder to his own right heirs. As to the other moiety, to the use of his sister Spencer for life, and with like remainder to trustees, then to his nephew John Spencer for life, &c. like [143] *remainder to trustees, then to the heirs of his body, then to his brother in the same manner, then to every other son of the body of Mrs. Spencer, &c.*

The testator died. *Thomas Bagshaw* died unmarried. *Benjamin* the second devisee brought a bill against the trustees and all proper parties, to have a performance of the trusts of the will, and the personal estate applied to payment of debts, as far as it would go; and such part of the real estate as necessary for the residue; which was heard at the *Rolls*, November 21, 1732, and decreed, that so much of the real estate, as would be necessary to answer the debts, &c. or the whole, if necessary, should be sold: and if there was no more than would raise the same, there should be a commission of partition; and the whole, the surplus after the trusts performed should be reinvested in the purchase of land; reserving the consideration how the remainder of the trust estate should be limited till after the report. In the same term *Benjamin* the plaintiff there, suffered a recovery of his moiety of the estate. May 28, 1737, was the *Master's* report stating the debts, &c. that it was for the benefit of all parties interested, that the whole estate should be sold; which report was confirmed. *Benjamin Bagshaw* suffered a recovery and made a will; devising this moiety to his wife in fee, making her executrix, and died January 1738. The wife brought a supplemental bill, in nature of a bill of revivor for carrying the former decree into execution, and to have the benefit of that moiety of the trust estate, to which *Benjamin Bagshaw* was intitled; which was heard at the *Rolls* in 1743, and decreed, that *Benjamin Bagshaw* was intitled to an estate tail the moiety, by the will of *Benjamin Ashton*. [vide S. C. 2 Atk. 570.]

From this last decree was the present appeal.

Lord Chancellor having taken time fully to consider the case, now pronounced his decree.

The merits depend on the first will; and there is nothing subsequent making a material variation. The rights of the parties therefore must be taken as they were at the death of the first testator, and the determination of the court, the same as if *Benjamin Bagshaw* was now alive, and praying a conveyance of the moiety to himself; which reduces this case to

two general questions upon the will. First, whether the estate devised to *Benjamin Bagshaw* was a trust or legal estate: that is an use executed by the statute, or a mere trust in equity? Secondly supposing it a trust in equity; whether it was an estate tail to him, or an [144] estate for life only, with contingent remainders over to all the issue of his body successively?

As to the first, *I am of opinion, that this devise of the moiety was merely a trust in equity: the first devise is to the trustees and their heirs; carrying the whole fee in point of law.* Part of the trust is to sell the whole or a sufficient part for the payment of debts and legacies: which would carry a fee by construction, although those words were omitted out of the devise; as in *Shaw v. Weigh, Eq. Ab.* 184. Then the trustees may sell the inheritance of the whole by virtue of their estate, not of their power: they must have a fee in the whole, otherwise, as it is uncertain, what they may sell, no purchaser could be safe; which differs this from *Cordals's* case, *Cr. E.* 315, cited in *8 Co.* 96. *a.* and *Carter v. Barnardiston*, *1 P. Wms.* 505 and *Popham and Bomfield*, *1 Vern.* 79, and *Randal v. Bookey*, *Pre. Chan.* 162, in all of which cases there were neither *Heirs*, nor other words of limitation, nor an express trust to sell; being a mere chattel interest, like an *Elegit*, to hold till debts were paid. The only doubt I had, was on the case of *Lord Say and Sele v. Lady Jones* (1), *November 16, 1728*, before *Lord King* and affirmed in the *House of Lords* in *March, 1729*, as to this point: but on examination that case differs in a material part; and taking together all the clauses of the will, it amounts only to a devise to trustees and their heirs during the life of——, and only an estate *per auter vie*; upon which a legal remainder may be properly limited, and so held: but in the present case the whole fee being in the trustees, a remainder of the legal estate in this moiety could not be limited to *Benjamin Bagshaw*. It has been argued, that it may be good by executory devise: but could *Benjamin Bagshaw* thereby take a legal estate therein? He could not; or did not, if he might; and his devisee cannot claim it from him; for it is too remote; being after all debts indefinitely be paid; which may in point of time exceed a life or lives in being, or any other time allowed by law. But a clear answer is because the recovery by *Benjamin Bagshaw* was before the debts were paid; and consequently while the fee remained in the trustees, and he could not make a good tenant to the *præcipe*. Then supposing it a good devise in law to *Benjamin Bagshaw*, this would prevent its passing by his will; for whatever makes the recovery void, equally defeats the plaintiff's title, whatever be the construction of the will: and so vests in the defendant heir at law of *Benjamin Ashton*, which makes it necessary for the plaintiff to admit, that all the subsequent devises are trusts in equity.

The second and main question (whether it is an equitable estate tail, or for life only, with contingent remainders to the issue) depends on the construction of the words *heirs of the body lawfully, &c.* [145] as they stand in the will, whether as words of limitation or purchase: for if of limitation, he was tenant in tail, and the recovery was good in equity: if of purchase, he was tenant for life only, and it is void. To

(1) *8 Vin. Ab.* 262. *1 Eq. Ca. Ab.* 389. and *3 Bro. P. C.* 113. octavo edit.

determine which, three things must be considered (n). *The intent of the testator in the devise*; whether that intent is consistent with and can take effect according to the general rule of law and equity: and whether there is any particular settled rule or determination of the court standing in the way of and preventing the intent from taking effect. Under which last head I propose to consider the distinction between trust executed and executory, and the objection urged from thence in favour of the plaintiff.

As to the intent, it is clear. The first motive was to make a strict settlement among all his nephews, the sons of his sisters. To all the nephews in being, and proper to be made tenants for life, he expressly devises it so; and in the same words he has penned the devise of the other moiety to his sister Mrs. Spencer, who was then living; concerning whom, no doubt she was but tenant for life; adding to all *without impeachment of waste*; which though often held not sufficient to prevent the operation of law arising from the subsequent words, yet it is a mark of the intent to give an estate that would be punishable for waste, if not so exempted: *then to trustees to preserve, &c.* during the life of Benjamin Bagshaw; which is made the great point for the defendant; and speaks first, that he intended to give his several nephews, and particularly Benjamin, such estate only as might be forfeited. The estate to the trustees is after the determination of his estate for life; which could be determined but two ways, by expiration of the life or forfeiture. The former he could not mean, the remainder to the trustees being given only during the life of Benjamin; therefore he must mean the latter. The next thing is, that there were some contingent uses or remainders to be preserved; and throughout the devise there are none, unless the limitations to the heirs of the bodies of the several nephews are such. The question then upon the intent is, whether these circumstances are not as strong to restrain this to a devise for life only, as if expressed by negative words, as *non aliter*; which in 1 Ven. 231, was admitted by Lord Hale, to make it but an estate for life: and in *Backhouse v. Wells, Eq. Ab.* 164. H. 10 Anne, the estate for life was not absorbed in the subsequent limitations. So here, from the testator's declaring his meaning as to *waste, forfeiture*; and it being followed by contingent remainders, it amounts to the same, as if he had expressly declared his meaning that it should be for life only, with contingent remainder to the heirs of his body. The plaintiff's counsel were under great difficulty to frame an argument, shewing the intent to be in their favour, and only relied on this; that the testator has shewn by the will that [146] he understood the difference between words of limitation and words of purchase proper to make a contingent remainder; and therefore that in the devise of the other moiety, where he gives it to those after-born sons of his sister, to whom he intended an estate-tail, it appears, he knew, that the words *heirs of the body* would create an estate-tail. But the difference of the penning imports the contrary, and strengthens the evidence of the intent on the other side; shewing that as to those born, the testator knew he could make them tenants for life, only with contingent remainders, &c. but not those unborn: and with this view therefore

(n) If testators intention appears that he meant the word *heirs* in legal sense, the rule in *Shelley's case* must take place, though there should be express words that the heirs should take by purchase, or that devisee should have only an estate for life, but the rule is not applicable where testator used the words in any other sense, 1 Brown, 206.

he left out the words *for and during their natural lives, and without impeachment of waste*, and no clause to preserve contingent remainders: which plainly shews, that in the first he meant a mere estate for life, and to use *heirs of the body* as words of purchase, and in the other as words of inheritance and limitation, because the law would not suffer a contingency after a contingency.

Then admitting this to be the intent: The next question is, whether it is consistent with, and can take effect according to the general rules of law or equity? And here the plaintiff places her great strength, for it is said, that the law will not suffer its rules to be contradicted; but will supersede the intent, and reduce the gift to its own operation, such as it will allow; and that it is a clear rule ever since *Shelley's* case, that wherever the ancestor takes a free-hold, and by the same gift there is a limitation to his heirs, or heirs of his body, they are words of limitation, not purchase, and the estate unites and gives an inheritance. I admit the general principle, that the law will not suffer devises contrary to its rules; but it is misapplied here; the true application being to the nature and operation of the estate intended to be created, and not to the construction of the words; for though sometimes it may be applied to some technical words, to which the law has fixed a certain sense, yet even then it has been unskilfully applied and without proper distinction. The law will not suffer a perpetuity or the freehold in abeyance in a will or deed; nor a fee upon a fee, nor a chattel to heirs; and the reason is, because it would change the law, and by acts of private persons vary the rules of property. It arises therefore from want of power in the testator: but in the present case, there is no want of power; there being no doubt but the testator might devise for life with contingent remainders, as the defendant contends. The only objection is, that he has used improper words, which the law will not allow for that, although the intent is plain: but is not this hard to say, and repugnant to the first fundamental rules in explaining wills, that the intent shall govern the construction? The testator is presumed to be *inops concilii*, and therefore, though he uses unapt and barbarous words, the law will so frame and mould them, as to make proper sense to serve the intent; as in *Boraston's* case, 3 Co. and *Manning's* case, 8 Co. 95. which has been constantly adhered to since; and cannot be done here without construing *heirs of the body* as words of purchase [147] and description. However it is still urged, that the law in *Shelley's* case, and in *Bret v. Ridden*, Plow. has fixed the sense of those words to words of limitation: but that is so far from holding, that there are several cases, even in law, in which they are held as well words of purchase, as in *Archer's* case, 1 Co. 66.; the words of limitation added there, and in all those cases, are only demonstration of the intent of the testator in using the first words. So in *Moor*, 593, and in cases cited in *King v. Melling*, and *James v. Richardson*, 1 Ven. 334. and *Long v. Beaumont*, in the House of Lords (1), May 1714. But there is still a stronger authority; where even in the case of a deed, in construing which the same latitude is not allowed as in wills, they were taken as words of purchase to serve the intent, viz. *Lisle v. Gray*; which, through mistake, is in 2 *Jones* said to be reversed: whereas from the *Register* it appears to have

(1) 3 Bro. P. C. 60. oct. edit.; and 1 Bro. P. C. 489. fol. edit.

been affirmed, *Pollexfen, Ray.* 315. 2 *Lev.* 223. To this it was said there were several other words in that case, which I allow; but still it is an authority, that they may at law upon a deed, be construed as words of purchase, if the intent requires it. The other words are only a sign of the intent; and it is an unanswerable argument, that if some words shewing the intent may turn it into words of purchase, others may: there being no magic in any particular words. To this is objected a considerable authority, to prove that the interposition of trustees to preserve contingent remainders between the first taker and the heirs of his body, is not sufficient to turn them into words of purchase, *i. e.* *Colson v. Colson*, in *B. R.* May 8, 1744 (o), [2 *Str.* 1125, 2 *Atk.* 246] which was a devise by *Robert Bromley* to his grandson *Robert Colson* and his assigns for his natural life, of all his reversionary right and interest expectant on the death of his sister; and after the determination thereof, to trustees and their heirs during his life, to support the contingent remainders after named from being destroyed: but to suffer him to receive the rents for life; and after his death to the heirs of his body lawfully begotten or to be begotten: in default of such issue, to another grandson in like manner, with the same trust to preserve, &c. and then to his right heirs. Upon a question whether *Robert Colson* took an estate-tail or for life, all the judges of *B. R.* certified, that the interposition (p) of trustees made him take an estate for life, nor merged by the devise to the heirs of his body: but that thereby an estate-tail in remainder vested in him: which is said to be a clear authority, that upon that will the inserting a limitation to trustees to preserve, &c. was not sufficient to change the sense of *heirs of the body* into words of purchase, even though there were noother contingent remainders in the will. But if it differs from the present; here being a clause of *without impeachment of waste*; although that might be thought to deserve but little weight; but the great difference is, that this is a devise of a trust in equity; that of a mere legal estate; the words of which must be taken as they stood, according to the strict legal determination; and the judges might have thought, they could not [148] take into consideration the trust, but only the legal estate, and how that separately taken could operate. But here all the limitations are of a trust; the construction and direction whereof is the proper subject of the jurisdiction of this court, which is bound to decree according to the intent; as was determined by the *Master of the Rolls*, with which I agree; and that as this is a trust, consequently a greater latitude must be allowed to comply with the intent, since it is to be settled and reduced into a conveyance by this court. Lastly, the opinion there given furnishes a new light, which did not appear at the last decree at the *Rolls*; the judges holding that the interposition of trustees prevents the estate for life from being united with and merged in the inheritance: which affords a decisive argument, that, if this case be law the court must in directing a conveyance depart from the words of the will. The answer given to this difference between the cases is, that limitations of trust and legal estates are by the same rules, and the construction the same in both: otherwise there would be different rules of property, according to Lord

(o) In *Douglas*, 326. Lord *Mansfield* said, Lord *Hardwicke* told him that he was dissatisfied with this decision, but thought it was not now to be shaken.

(p) 2 *Atk.* 246.

Nottingham's concessions in the Duke of *Norfolk's* case; which I allow; and also his principles. But let these concessions be rightly understood: he does not say, that the construction of the words must be exactly the same in both cases; or that a court of equity cannot expound the words more liberally, when directing a conveyance, to comply with the intention. His reasoning there is plainly applied to the measure of the limitations, that they could not be carried further in the one case than the other in limitations of a term; which appears from the words following, that a limitation of the remainder of a term after an estate tail therein is void. To this his other argument, that otherwise there would be different rules of property, is properly applied; for the measure of the limitation does essentially concern the rules of property, and how near we may approach a perpetuity; but not how far we may go to find out the true meaning of the testator, freed from the technical use of the words. Upon this reasoning are several resolutions. *Papillon v. Voice*, Eq. Ab. 185. 2 P. Wms. 472. by Sir *Joseph Jekyl*; with whom Lord *King* concurred, that the intent was plain to give an estate for life only, with contingent remainders of the inheritance, upon the clause appointing trustees to preserve contingent remainders: but held it an estate tail by force of the technical words *heirs of the body*, as to the devise of the lands: though he agreed, as to the money to be laid out in lands, with Sir *Joseph Jekyl*; who held that the intent governed in both cases. But it is observable, that it was not necessary for Lord *King* to give that opinion; it being extrajudicial; because by the supplemental bill the marriage articles were admitted into the cause, by which it appeared, the plaintiff was clearly intitled to an estate tail in the lands, and that it was not in his father's power to devise it: but upon this there is something remarkable; that the cause being heard on *Saturday*, Lord *King* did not pronounce his decree till *Monday*; when he said, he had looked into *Lisle v. Gray* (1), [149] which was very strong, and seemed to be less clear in his opinion: but as the supplemental bill had brought a new title for the plaintiff, he did not give it further consideration. And it is observable, that he took care to express, that the direction for reversing that part of Sir *Joseph Jekyl's* decree, relating to the writings, was founded on the supplemental bill; which looks, as if he wanted to avoid that point. However since the case of *Colson v. Colson*, I will urge that of *Papillon v. Voice* no further than as an authority, that a trust estate by will so penned ought to receive such a construction, and the court to direct conveyance accordingly: in which the court is clearly warranted by former cases; as in *Leonard v. Earl of Sussex*, 2 Vern. 526. Upon which case I only observe, that if the devise had been of a legal estate, with such clause not to alien, the sons must have been tenants in tail, and there would be no operation from that clause: and yet upon a trust in equity it would turn them into tenants for life. And it is difficult to shew, why the devise here to trustees to preserve contingent remainders, should not have the same construction. Another great authority is on Serjeant *Maynard's* will, Sir *John Hobart v. Earl of Stamford* (2); the words of which were with immediate remainder; there followed negative words *and to no other use or purpose*.

(1) 2 Lev. 223, and Lord Raym. 278.

(2) 19 Vin. Ab. 360. Fearn's Cont. Rem. [173.]; and 3 Bro. P. C. 31. oct. edit.

It is first to be observed that both this court and the *House of Lords* construed *heirs male of the body* in the sense of first and every other son. Secondly, taking the words as in a conveyance by deed, the limitations to the heirs male of the body of such first son was void in law; the limitation to the first son being for ninety-nine years only, not a freehold; consequently it could not unite with the limitation to the heirs male of the body, within the rule of *Shelley's* case: and by contingent remainder it could not be good; because there was no freehold to support it; and yet the court made good the whole, by inserting trustees to preserve contingent remainders, although the private act of parliament had not inserted it. Thirdly, the testator had expressly inserted in the will, a clause to preserve remainders after limitation for life to —; and therefore it might be argued, that where he (as able a lawyer as perhaps *Westminster Hall* has seen) had omitted it, he did not intend it; the will concluding also negatively, which though a more forcible objection, than what is drawn here from the different penning of the devise in the other moiety, to the after-born sons of *Mrs. Spencer*; yet did not prevail against the intent to make a strict settlement. That case was precedent to *Papillon v. Voice*: but there are many subsequent. In *Ashton v. Ashton*, before Sir *Joseph Jekyl*, *Joseph Ashton* devised £6000 *South Sea* stock, and £12,000 to trustees, to sell and lay out in the purchase of lands, to convey to *George Joseph Ashton* for life, and afterward to the issue of his body: in default of such issue, then over. *George Joseph Ashton* brought a bill for performance: the question was, whether he had an estate for life or in tail? It was insisted

for him, that had it been devise of land, he would be tenant in [150] tail, and there should be the same construction; but the court

held it an estate for life only of the lands to be purchased; which determination stands unappealed from. The words of the limitation there were *issue of the body*, not *heirs*, as here: but that was held to be as strict as the other, and equally gave an estate tail in lands legally devised. In *Withers v. Algood* (1), July 5, 1735, (from the *Register*) *J. A.* seised in fee of ground-rents, and possessed of terms for years in houses, conveyed to trustees to hold such as were freehold to the use of the trustees and their heirs, the leasehold to the trustees, their executors and administrators in trust to apply the rents and benefit of redemption to *Hannah Withers* for life, and afterward to the heirs of her body, and of *J. and M.* their heirs, &c. After the testator's death *Hannah Withers* brought a bill for redemption and performance of the trust. Upon a question whether she took an estate for life or in tail in her share by this trust, Lord *Talbot* held it only an estate for life: decreeing a redemption for her as tenant for life: the words were *heirs of the body*; and yet were held words of purchase. It has been said, that the reason was, because joined with others who were to take by purchase: but that amounts only to this, that a plain indication of the testator's intent will change words of limitation into words of purchase. This argument was not conclusive or of necessity to make them words of purchase. In a manuscript case which I have seen of it, Lord *Talbot* said, the rule of law was not so strict as to controul the intent where it was plain. In *Lady Glenorchy v. Bosville*, cases in *Tal.* 3, 1733. Lord *Talbot* held, that the plaintiff took only an estate for life, with remainder over: but notwithstanding held, that according to *King v. Melling*, 1 *Vern.* issue was as proper a word of limita-

tion, as *heirs of the body*; and that if it had been a devise of a legal estate, the plaintiff would be tenant in tail; but being a trust, he was at liberty to make a more liberal construction to comply with the intent: and the argument that the testator knew the difference, and where it was proper to insert trustees to preserve contingent remainders furnishes a stronger objection than is drawn here from the limitation of the other moiety to the after-born sons of Mrs. *Spencer*, and yet did not prevail to support the legal construction of the words of the will against the intention.

As to the third and last consideration; on the part of the plaintiff are objected two rules in the way of the defendant. First, that though in decreeing an execution of marriage articles for valuable consideration, the court will make such construction, as will render the contract effectual: yet on a will, under which all claim as volunteers, the words devising a trust estate must be taken, as they are and the court cannot depart from them. Secondly, that even in a will there is a difference between trusts executed and executory; in the latter the court using a greater latitude to answer the intent.

In support of the first objection it cited a leading authority [151] *Bale v. Coleman*, in the *Register*, lib. A. fol. 309. 2 *Vern.* 670. 1 *P. Wms.* 142. It is true, there is a distinction between the construction of marriage articles and of trusts in a will (o) (but it is admitted, the intent ought to prevail in both) therefore I have not cited any case arising from marriage articles. But I deny the proposition, that, because under a will all parties claim voluntarily, the words of the will devising a trust estate must be taken as they are; and that the court cannot depart from them; there being several authorities to the contrary: and so it must be of necessity; because if the court was, when bound to convey, obliged to use the same words, it would have a different operation: as for instance, the word *issue* in a will is generally and properly a word of limitation; but in a deed a word of purchase, and must operate accordingly.—Consequently the court must depart from the words to comply with the intention upon the whole frame of the will. To examine *Bale v. Coleman* particularly. Lord *Comper's* decree was reversed as to part by Lord *Harcourt*; from whose reasons it has been argued for the plaintiff, more than from the judgment itself. The first part of his declaration, distinguishing it from marriage articles, is right; but has nothing to do here: and the case there put by him, was of articles limiting the estate to husband and wife, and the heirs male of their bodies: which would be decreed here in strict settlement. It is true, there is no case, where it is so held on a will; nor ever will be, where no more than is there stated, nor any intent to preserve contingent remainders inserted. The next clause of his declaration is applied to the devise of a legal estate. The next relates directly to the devise of a trust; (and, I own, goes a great way) that the same words in a will, which at law would create an estate tail, ought to be construed by this court, when they fall under a trust and are to be carried into further execution, (as in the present case) so as to carry an equitable intail. The proposition includes all trusts, as well executory as executed; the words being *which are to be carried into further execution*; and in saying that the court must adhere to the words of the will, notwithstanding the trust is to

(o) 1 *Brown*, 338.

be carried into further execution, I fear, he was not so fully informed of precedents; all the authorities I have cited, being directly contrary thereto. At the conclusion of the general argument of this declaration is a very remarkable clause: that admitting the debts paid, the same construction ought to be, as if originally no trust: but I cannot see how that subsequent fact could vary the construction of the will; but if it could, it is different from the present; the estate not being sold, nor trust performed. I dwell the longer on this declaration, as it has been much relied on; and must add a circumstance within my own private knowledge: that Lord *Harcourt*, after he was out of office, expressed himself strongly against declaring general reasonings in this court, which might [152] affect other cases here; to which I wish he had adhered in this case. But to add force to the precedent it is said, this case was again reheard by Lord *Comper*, who was convinced, and approved by Lord *Harcourt's* reasons; but that is a mistake, and second rehearsals are contrary to the general rule of this court. Therefore it must only have been said *obiter*; and after all, the reversal of that decree may be maintained without the aid of that detail of general reasons, and plainly differs from the present case.

As to the second objection (p), of the difference between trusts executed and executory; no one is more unwilling than I am *quieta movere*. But this distinction never has been established by any direct resolution, though said *arguendo*; and was it to be examined to the bottom, it might sound strange, how it should be established (1). All trusts in notion of law are executory, and to be carried into execution here by *subpana* according to the old books. At common law every use was a trust; the statute enjoined the legal estate; thereto, and therefore a trust executed is in strictness a legal estate; so that to bring a case within the jurisdiction of *Chancery*, it must be executory. The first essential part therefore of a trust is, that the trustees is to convey the estate some time or other, whether the testator has directed it or not; which every testator is presumed to know. Therefore a doubt may be reasonably made, how there can be a difference, whether the testator has in words directed a conveyance or not: since the court take notice, that the testator could not intend it should always remain in trustees. I have said, this may be doubted of;

(p) 2 Vol. 323,

(1) Mr. Fearné however observes, (Cont. Rem. [166].) that this distinction seems to have had its weight as well as in cases precedent to this as in those subsequent; and he shortly afterwards enters into the discussion methodically and very fully (p. [207. & seq.]) Supporting the former part of his observation, not only by the case of the Earl of *Stamford* v. Sir John Hobart, *Leonard* v. Earl of *Sussex*, *Papillon* v. *Voice*, and *Glenorchy* v. *Bosville* but by the authority of Lord *Hardwicke* himself, in *Roberts* v. *Darwell*, 1 Atk. 607. and *Baskerville* v. *Baskerville*, 2 Atk. 281. See therefore Fearné, *ubi supra*, and in particular, p. [211.] [212.] &c. As to subsequent cases, Mr. F. refers to *Wright* v. *Pearson*, Amb. 358, but more fully reported as to Lord Keeper *Henley's* argument, Fearné, Cont. Rem. 187, &c. and *Jones* v. *Morgan*, 1 Bro. 206. It should be observed, that although Mr. F. seems to doubt the propriety of the decision itself, in *Wright* v. *Pearson*, relative to other points, he nevertheless lays great weight on the Lord Keeper's position on the above distinction, vide [p. 215]. Vide also *Garth* v. *Baldwin*, post, 2d Vol. 646, and Lord *Thurlow*, C's observation upon it, 1 Bro. 222. It seems upon the whole that a trust estate will, in such cases, follow the nature of a legal estate, unless a plain intention to the contrary is to be collected from the instrument itself.

and do not choose to carry it further, out of deference to those great men who have relied on it. I have great deference for Lord *Talbot's* opinion; but take his decree in *Lady Glenorchy's* case to be so right as not to want the aid of the distinction there made. [*Talb.* 19.] But how far did it amount to a positive opinion to bind him? The words are, that in trust executed or immediate devise, it ought to be the same in law or equity; because the testator did not suppose there would be any other conveyance, and therefore no other conveyance would be presumed: but I have shewn that some time or other conveyance must be made; which the testator is presumed to know. If by the words *act executed*, is there meant *deed in the testator's life*, it is proper: but if only a devise to trustees upon immediate trust, without expressly directing a conveyance, I beg leave to doubt of it, and whether the court would not be bound to direct a conveyance in strict settlement, as it was there in *Leonard v. Lord Sussex*: but it appears in the end, that Lord *Talbot* formed no fixed opinion to bind himself; but only an inclination, if it was an immediate devise; and it appears, that he afterwards relaxed from it. For in *Withers v. Algood* he made the same construction upon a trust in a deed, wherein was no direction of conveyance, nor any thing to distinguish it from a trust executed.

I have now gone through the general reasoning; but one [153] thing in this case is particular and decisive. I laid it down at first, and in this agree with the *Master of the Rolls*, that nothing since the death of the testator can vary the construction of the will or the rights of the parties: but the determination must be the same, as if *Benjamin Bagshaw* was now alive, and came to the court for a decree, in which case the surplus of the money arising by the sale must have been decreed to be laid out in lands, one moiety to the use of *Benjamin Bagshaw*, remainders over. Then the question would have arisen, whether a direction to preserve contingent remainders should be inserted or not? If to be inserted, then the next limitation of the use must have been to the first &c. son of *Benjamin Bagshaw* in tail male, remainder to the daughters in common; and not in the very words of the will; because it would be absurd and contradictory to preserve contingent remainders, where there are none: as in *Papillon v. Voice*, where the words of Lord *King* are, that if the conveyance should be in words of the will, it would be blundering. Consider then, whether it ought to have been left out; for then the conveyance must have been to *Benjamin Bagshaw* for life, without impeachment of waste; and after to the heirs of his body with other remainders over: and which would give an immediate estate-tail in possession. In one or other of these, the conveyance must be; and taking which you will, the court must have departed from the words. The question then is, whether the court ought to do that, to comply with the intention, or to contradict it? And I hold with Lord *Hale* in *Pybus v. Mitford* 1 *Ven.* 378. that we ought to serve the intent, if we can, as the best expositor we can go by. But it is objected, that still you must adhere to that, which would be the legal operation of the words of the limitation of a trust, when reduced into a common law conveyance; but I deny that general proposition, which I have disproved from reason and authority. But for argument's sake, admitting it, the court could not have done it here, by leaving out trustees to preserve, &c. without conveying to *Benjamin Bagshaw* a different legal estate

from that which the words of the will would have carried, if it had been a legal devise of land. In *Colson v. Colson* it was a devise of a legal estate, and the words nearly the same: and it was held, because of the interposition of the remainder to trustees, that it was an estate for life not merged in the devise to the heirs of the body; but an estate-tail vested in remainder. The consequence of that opinion, if right, is, that if the court in framing a conveyance in the present case, had left out the devise to trustees to preserve, &c. the court would have given not only a different equitable, but also a different legal estate, from what the words in the will would have given; for by leaving it out *Benjamin Bagshaw* would have an immediate estate-tail in possession; but in the other case, an estate for life forfeitable. So that if the court should direct a conveyance of this moiety to his use for life, and after to the heirs of his body, they would not only depart from the (q) words of the will, but also [154] from the legal effect thereof, and contradict the intent: which I cannot think myself warranted to do.

So much therefore of the last decree by the *Master of the Rolls*, as declared it an estate-tail to *Benjamin Bagshaw*, must be reversed; and instead thereof, as all the particular limitations are by the event determined, one moiety of the clear surplus by sale of the trust estate, be paid to the defendant *Spencer*, heir at law of *Benjamin Ashton* (1).

(q) This case was determined agreeable to testator's intention, but contrary to the rule of law laid down in *Shelley's* case, viz. where the estate is given to the ancestor, and also in any part of the same instrument to the heir, or heirs of the body, the estates unite; which rule was recognized afterwards by Lord *Hardwicke*, in *Garth* and *Baldwin*, 2d vol. 646; and by Lord *Thurlow*, in *Jones* and *Morgan*. 1 Bro. 206.

(1) It should be remembered, that Lord *Thurlow*, C. said, he was not satisfied with the reasons of this determination, see 1 Bro. 217, 221, 222.

BUTTERFIELD v. BUTTERFIELD, Nov. 12, 1748.

(Reg. Lib. 1748. A. fol. 75.)

Vide Ante, 133. 135.

Lord Chancellor now delivered his opinion.

I HAD no great doubt before (r); and think it too remote a limitation of a personalty (s); there being nothing to restrain it to heirs living at the death: for then it might take effect; so was it determined by me in Lord *G. Beauclerc* v. Miss *Dormer*, 2 Atk. 308. and in another case: and by Sir *Joseph Jekyl* in *Milward* v. *Milward*, in 1734.

The only objection is, that here is no gift, but only a direction to pay the interest to him for life; but that makes no difference: it being plainly

(r) 1 Brown, 170, 188. Fearn, 341. 2 Brown, 33. Ante 9.

(s) It is now settled, that a limitation of a personal estate in tail, vests the whole in the first taker. 2 P. Wms. 290. Vin. Vol. 8. 451. Daw, Pitt and Western, reported in Fearn, 347. Prec. Chan. 341, the contrary doctrine was formerly held, and that the first taker had only the use of the devise for life. 1 P. Wms. 1. 1 Eq. Ab. 301. 2 Vern. 245, 332.

given to the heirs of his body and the profits being to him for life, it must necessarily vest the whole interest and property to him. As in *Co Lit.* a devise of the profits of lands to *A.* for life, and afterward, the same lands to the heirs of his body is an estate-tail in possession; *profits* being the same as the lands themselves.

To decree therefore must be reversed; otherwise I should go farther than any case has gone, and occasion great inconvenience.

BUXTON v. SNEE, Nov. 15, 1748.

(Reg. Lib. 1748. B. fol. 176. entered as *Buxton v. Sidebotham*.)

No lien on a ship, or proceeds from sale of it, for repairs done, except in course of a voyage; liberty given to bring an action as to the personal liability of the part-owners who received the benefit. *Lord Hardwicke's* decision in *Doddington v. Hallett*, post, 497, has been over-ruled and now settled that part-owners in a ship are not to be considered as partners.

THE demand by the plaintiff was for work done in repairing a ship (t).

The defendants were part owners, or their representatives, who received the benefit thereof: and notwithstanding insisted, that they should not make a satisfaction.

LORD CHANCELLOR.

This is undoubtedly a harsh defence (u). Their having received the benefit is not sufficient to make them liable: for the court will not do so, if the court cannot come at it by way of contract or consequential equity.

The questions on this case are two. First, whether the part- [155] owners by the employment of the plaintiff, either by the master or the husband are become personally liable for the debt created, and contracted for the repairs? The second, supposing they are not, whether the ship itself has contracted a lien by the *Admiralty* law allowed here; and then whether the money arising by the sale is answerable to the plaintiff?

I will consider the last question first, and am of opinion that the plaintiff is not intitled to follow the money into the hands of the defendants. Certainly, by the *maritime* law, the master has power to hypothecate both ship and cargo for repairs, &c. during the voyage; which arises from his authority as master, and the necessity thereof during the voyage: without which both ship and cargo would perish; therefore both that and the law of this country, admit such a power. But it is different, where the ship is in port, *infra corpus comitatus*, and the contract for repairs, &c. made on land in *England*; then the rule of that law must prevail. I know no

(t) 1 Salk. 34. 1 Stra. 695. 1 Atk. 234. Douglas, 97. Cowper, 636.

(u) It has been held, that where a captain contracts, for the use of the ship, credit is given him in respect of his contract: also to the owners as the contract is on their account, and the creditor has a specific lien on the ship; also a captain not personally contracting is not answerable personally for the ship's necessities. Per Lord Mansfield, in *Farmer and Davies*, Hill 26 Geo. 3. B. R. reported by Durnford and East.

case, where the repairs, &c. whether it was by part-owners or sole owner, master or husbands, have been held a charge or lien on the body of the ship. *Watkinson v. Barnardiston*, 2 P. Wms. 367, being a direct authority to the contrary; and if the river *infra corpus comitatus* should be proceeded against and stopped for such debt, the courts of law would issue a prohibition; the contract being at land, and not arising from necessity (1). If therefore the body of the ship is not liable or hypothecated, how can the money arising by sale be effected or followed; the one being consequential of the other; so that the foundation of an equity's arising for the plaintiff fails. But it is said, that sounds harsh in a court of equity; for even admitting there is no lien on the body of a ship, yet the defendants having received the benefit should make satisfaction; but that follows not as an equitable consequence; for suppose the owner of an house lays out a great sum of money in repairs; upon its descending to his heir at law he cannot be affected with the debt for these repairs, although he receives the benefit; for though that be the law of *Holland*, that it is a lien on the house, it is not so here: for if whoever receives a casual benefit, should be liable to make satisfaction, it would extend to several cases where it ought not. The demand then must rest on the first question: whether the defendants, or those in whose place they stand, are personally liable for the debt; of which I doubt; but will give the plaintiff all the assistance I can; for it is just, that if he can come at it, he ought. Undoubtedly in general, whoever contracts with another, as factor or agent for a third person, it will bind his principal (2); and there is an election, as in the case of *Blackwell-Hall*, and several other factors, to being an action against either; and there are several cases, where an action may be brought against a principal, though not named at the time of the contract. As among the *Brokers*, who will not be allowed as witnesses to prove the con-

[156] tract, and that it was made for the principal, though they were not named. It is no answer therefore to say, that the part owners are not named.

Then how far the act of the master, can create an *Assumpsit* between the plaintiff and the part-owners. Had it been in the course of the voyage, it would have been another consideration; but here it seems the master did not act as agent for the part-owners, but the husband's. It is true that is in the answer under the words *heard and believe*; but not being replied to, it must be taken as evidence, because no opportunity is given to prove it.

Then the question, which is very material, and in respect of which I am not sufficiently informed of the course of trade, is upon the husband: whether the part-owners are bound by the contract with the husband: he being general agent? Supposing the principle upon which the plaintiff goes, is true, the contract with the husband is joint, and will survive.

The most beneficial thing then, that can be done for him, is, to direct, that he be at liberty to bring an action against the survivors: to restrain the defendants from pleading the statute of limitations, or from insisting

(1) See 1 Salk. 34. acc.

(2) And see Cowp. 255. Bull. Ni. Pri. 130.

upon any discharge under a commission of bankruptcy against one of them.

But let the bill be dismissed, so far as it seeks any relief against the body of the ship, or the money arising by the sale thereof.

BURNET v. MANN, Nov. 15, 1748.

(Reg. Lib. 1748. A. fol. 634.)

Posthumous brother of the half blood shall take under statute of distribution.

Appointment pursuant to a power, good; though executed by will of a feme covert (1).

ONE question in this case was, whether a *posthumous* brother of the half blood should take, under the statute of distribution, a share of his intestate brother's personal estate.

LORD CHANCELLOR.

I cannot distinguish this from those cases where it is determined, that where an infant intitled to a personal estate dies intestate, his mother *en-sient* with a child, that child should have a distributive share of his brother's estate, as one of the next of kin, and in *rerum naturâ* at his death; *Wallis v. Hudson, Barnard*, [272. and 2 Atk. 115.] for the general rule is, that they are considered *in esse* for their benefit, not for their prejudice. Thus in the case of a posthumous child of the whole blood: the question is of the half blood; and it has been determined that as to the distribution of intestate estates, that makes no difference. So it must be here. If indeed it was to go to children born at any distance [157] of time, so as to cause an inconvenience by suspending the distribution, or to cause a taking back again, it might be an objection: but that cannot happen, because the child may be *in rerum naturâ* at the death of the intestate brother, whose estate is in question; but at the utmost it cannot be carried beyond the year, in which a distribution is to be made.

Another question was as to the validity of an appointment, under a power given to husband and wife, and the survivor over a reversionary interest after her death, to be by any writing under hand and seal in the presence of two witnesses. The wife after husband's death marries again, and during coverture appoints by will under hand, &c.

And that an execution of a power by a wife is allowed, was cited *Lady Roscommon v. Major Fowke*, in the *House of Lords* (2): although there it was to execute after a power of revocation by any writing or deed.

Against this it was urged, that a writing in form of a will was a defective instrument here; for that it was not intended to be executed by will, but by some instrument in life-time; because to be executed jointly; and then when to be executed by the survivor, it should be by the same instrument.

(1) See also *Fettiplace v. Gorges*, 3 Bro. 8.

(2) 6 Bro. P. C. 158. and *ibid.* 167. note, octavo ed.

LORD CHANCELLOR.

There are several cases, where, when a power is reserved to be executed as here, a will pursuing the requisites has been held a writing within that power: and therefore in some instances where such power to a feme covert over a personalty is executed by her, by will proved in the *Ecclesiastical court*. I have ordered it to stand over, that it may be proved to be executed according to the requisites in the power; nor could it be intended in this case, that the instrument should take effect in the life of the parties; it being over the reversionary interest. Suppose she by an instrument, not in form of a will, had appointed expressly after her death; it would be good. Then it is no objection, that she has done it by an instrument, which speaks that it is to take effect after her death: and the gift appears to be the subject of the power: for there are several cases, where it is not necessary to refer to the power, if the acts done are sufficient and warranted.

ROACH v. GARVAN, November 16, 1748.

(Reg. Lib. 1748. B. fol. 32.)

S. C. 1 Dick. 88.—Guardian and ward. Marriage of a ward of court to a foreigner out of the realm (1).

Marriage in foreign court conclusive by the law of nations (2).

In what cases a sentence in court ecclesiastic will bind the rights of marriage.

Appointment of guardians resulted back to the court after dissolution of the court of wards.

Guardian will not be appointed after a marriage; nor discharged because of a marriage.

But without discharging guardians orders regulating their conduct may be made.

Liberal allowance for maintenance where a guardian or father is in distressed circumstances.

MAJOR ROACH having two daughters, one born at *Fort St. George* in the *East Indies*, the other at *St.*—— near it, sent them to *France* for their education, and put them into a nunnery. Mr. *Quan*, one of the persons in whose care they were left, and a banker at *Paris*, married [158] the eldest, who was then about the age of eleven, (as appeared by the best evidence) to his son then not seventeen. Their fortune was in the power of this court; and their mother applied to *Lord Chancellor* for the guardianship; which was granted.

Out of her custody the young ladies now petitioned to be taken, upon affidavits of her putting them to separate boarding schools, and endeavouring to marry the younger to one *Sparry*; and to have some other proper person appointed to be guardian.

Quan petitioned for a decree for cohabitation with his wife; and to have some money out of the bank.

And the mother petitioned for a reimbursement of her expenses in bringing them over.

After a long and full hearing *Lord Chancellor* delivered his opinion.

The reason I let this cause run out to such a length, was, to give several persons, upon whom aspersions were thrown, an opportunity of clearing themselves: and it is certainly a melancholy consideration to see so many

(1) See *De Manneville v. The Same*, 10 Ves. 52, &c.

(2) See 1 Vern. 21.; and Mr. *Raithby's* note.

private conversations and accidental circumstances made public, which were not intended to be so. These ladies were subjects of *Great Britain*; for though one of them was born at a place, which it does not appear, whether it belongs to the king of *Portugal*, this crown, or the *Great Mogul*; yet being born of a natural subject, the statute of *Queen Anne* (1) makes her a natural subject; nor can naturalization by a foreign prince change their allegiance, as has been said. The reason I refused to send over money for their maintenance was, that I should thereby have transgressed the statute, which makes it criminal in such cases: and also with a view to bring them over. I appointed the mother guardian; who is properly so by nature and nurture, where there is no testamentary guardian. The proper age to apply to remove a parent from being guardian, in a male is fourteen, in a female, twelve: but the court will never do it without some misbehaviour in the parent: the mother ought not to have sent them to boarding schools at such an age; but should have applied to the court to know where to place them. In case of minors the court chiefly regards their marriage; and the proper thing to be considered of in this guardianship is the benefit and advantage of the infants: and it cannot be convenient for them to continue with the mother longer, because of the quarrels which have been. The most proper person (as is admitted by the *counsel* of all sides, abstracted from their own clients) is Mr. Potter.

But the marriage of the elder, and *Quan's* petition thereupon, [159] brings a most extraordinary case before the court: their persons and fortunes being under the care of the court (which was very happy for them) the marriage was in general a contempt of the court: but although *Quan* himself, by reason of his tender years at the time, was not blame-worthy; in the father it was a most perfidious act, and breach of trust; and though a foreigner should be the contriver of such a match, if I afterward got him here, I would punish him. Then as to the fact of the marriage, if good, the court would take care, that the husband makes a suitable provision; but the most material consideration is as to the validity thereof: it has been argued to be valid from being established by the sentence of a court in *France*, having proper jurisdiction. And it is true, that if so, it is conclusive, whether in a foreign court or not, from the law of nations in such cases: otherwise the rights of mankind would be very precarious and uncertain. But the question is, whether this is a proper sentence, in a proper cause, and between proper parties? Of which it is impossible to judge, without looking further into the proceedings; this being rather the execution of the sentence, than the sentence itself? Where a marriage is in fact had, or in a contract in *présenti*, or in a suit for restitution of conjugal rights; a sentence in the *Ecclesiastical court* (unless there be a collusion, which will overturn the whole) will be conclusive and bind all: but not if given in a collateral suit, as for a criminal action; for it will only bind the rights of the marriage in the three cases above. This was in a criminal court in the *Chastelet* in *Paris*; and it is strange, if they have no other judicature in *France* for marriage than a criminal court: but the great point is from the subsequent acts; which are said by her assent to have made it good, supposing the sentence not

(1) 7 Ann. ch. 5. explained by 4 Geo. 2. ch. 21. The other statutes referred to are 1 Jac. 1 ch. 4.; and 3 Jac. ch. 5.

good, and that she was not, at the time of the marriage, of the age of consent. Cohabitation is indeed evidence thereof, unless it was under restraint; but this is a consideration for another court; and not a matter strictly for me to determine, who do not sit as a judge in an *Ecclesiastical court*, to decree a restitution of conjugal rights. Suppose the husband had brought an *Habeas Corpus* or *Homine replegiando*, which he may do for his wife: courts at law, who can only take care of the parties, would have left it to the proper remedy in the proper court. Then much less will I order any money out of the bank to be given him (1).

As to that part of the petition, which prays an appointment of a proper person: after the dissolution of the *court of wards*, (which was derived out of this court) though the rights of the crown were determined by the abolition thereof, it resulted back to this court, for the advantages of the infants to appoint guardians. But the question is, whether the court can do it in a

case, where there is so much evidence of a marriage; for after a [160] marriage there is no precedent, where the court has done it: and

I shall be very unwilling to make one. (y) Nor on the other hand will the court determine a guardianship or discharge any order made for a guardian, because of a marriage; of which likewise there is no precedent: but how to let it stand here, considering the mother's misbehaviour, is the question? But I may without disturbing the order, by which she was appointed guardian, make an order upon her, to let them be placed with Mr. *Potter*; which the court has often done. The court sometimes, though rarely, removes a testamentary guardian, but if he behaves not to the satisfaction of the court, orders regulating his conduct are frequently made upon him; as in the case of Lord *Noel* v. *Somerset*, and by me in the case of *Kneller*, which shall be done here; with the usual directions, not to marry without the leave of the court: and that *Sperry*, &c. neither write to or visit them: but this without prejudice to *Quan's* claim.

As to the mother's petition (z): she must be allowed those expences; and the daughters having consented to a very reasonable offer of part of their maintenance for her support (although I cannot come at it by their consent, they being infants), yet I may by the liberality, which the court uses on such occasions; as has been done even in the case of a father in distressed circumstances, when a sum of money has been left to his infant son, by a collateral relation; the court has there given a liberal maintenance for his support; but then it must appear to me, that the mother is in those circumstances.

(y) Guardianship of daughters determined by marriage, *secus* of sons. Ante 91.

(z) Mother having married a second husband, not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. 1 Brown, 268. Where the parent is of ability, maintenance not allowed though directed by the will. 1 Brown, 387.

(1) See *De Manneville v. De Manneville*, 10 Ves. 52. 56, &c.

BAKER v. WIND, *November 19, 1748.*

Mortgage—redemption resisted, and mortgagee ordered to pay costs (1).

Where a clause of redemption is in a separate deed, the court adheres to it strictly to prevent the equity of redemption from being intangled to the prejudice of mortgagor.

THE father of the plaintiff mortgaged an estate to the defendant; and by articles they agreed, that upon being reimbursed what he advanced, and £50 over, for such improvements as he might possibly make, he should reconvey: but this clause was not inserted in the deed of conveyance, the mortgagor, upon account of his creditors, being willing it should appear as a purchase; but by subsequent facts and agreements it appeared in proof, that the defendant admitted it to be a redeemable estate; and it had been referred to arbitrators; who, though they did not choose to make an award, yet were of opinion that he should take the money, and give up the estate.

The mortgagor's son, within a year after he came of age, but twelve years after the transaction, brought this bill to redeem.

For defendant it was insisted, that he should neither be redeemed, nor come to an account after so long a time. Citing *Cottrel v. Purchase*, *Talb. Cas.* 61.

[161]

LORD CHANCELLOR.

This is the strongest case that ever came before me, for the decreeing a redemption, where that redemption was controverted: and also to make the mortgagee, who opposed it not only lose, but pay costs: there being such a series of transactions in which it was constantly admitted to be redeemable, as it clearly was. The not inserting the clauses in the deed was an imposition upon the mortgagor; but the reason was, that he was in distress, and therefore turned it into the shape of a purchase; but still he meant it as a security. The value of the estate does not appear; but if he, as a friend to the mortgagor, thought fit to take it as security, he did it with his eyes open; and the redemption cannot be prevented; and wherever the court finds such a clause as this, it adheres to it strictly, to prevent the equity of redemption from being intangled to the prejudice of the mortgagor. And the getting a further sum of £50 inserted upon a mere pretence, for whether he approved or not (which was in his election) he was to have the £50, is an evidence of hardship put on him: then surely twelve years is not sufficient to bar a redemption. But the present plaintiff was a minor all that time; which in cases upon the statute of limitations is always deducted; nor did it rest as a thing undemanded, and the opinion of the referees was the same as would be decreed here, if ever therefore a mortgagee ought to pay costs, it is in this case. Reserve subsequent costs till the account is taken.

(1) *S. P. Smith v. Smith*, Cooper, Ch. Rep. 141. Et vide *Detillin v. Gale*, 7 Ves. 583.

SIR CHALONER OGLE v. THE REPRESENTATIVES OF ADMIRAL HADDOCK, *November 22, 1748.*

(Reg. Lib. 1748. B. fol. 13.)

Bill for an account and share of prize money dismissed; the sum being certain, and the remedy at law against the prize agents.

The remedy at law against the agents of captures.

THE bill was brought for a share of prize money.

LORD CHANCELLOR.

I am sorry this case is brought before the court, after an acquiescence during the life of Admiral *Haddock*, and in a case arising merely from the bounty of the crown; wherein the question is, whether the claimant shall take according to the intent of the crown in giving it, or upon the construction of the words in contradiction to that intent. However, if there is a clear right in the plaintiff, whether it arises originally from bounty or from consideration, he must prevail therein.

I shall consider it under two heads: First, in respect of the merits and mere right of the plaintiff as against the defendants. Secondly, in respect of the remedy he has pursued for it.

[162] As to the first, it depends on the several acts by the crown; the proclamation *June 19, 1740*, the declaration *June 18, 1741*, and the proclamation *June 14, 1744*. I shall apply my opinion and reasoning to the reprisals taken upon the first rupture with *Spain*, before the declaration of war published; because it must be admitted, that as to the produce of them, the right of the officers and seamen arises merely from the *King's* bounty, and has no relation to the act of 13 *Geo. 2.* not being in the nature of an execution of a power, or the same as if inserted in the original act of parliament.

The two first instruments must be taken together in the words. The first recites the act of 13 *Geo. 2.* and then directs a division of the prizes; and it is remarkable, that in speaking of the flag-officers shares, it stops short: but in giving all the subsequent shares, it says to be equally divided among them. The second directing a distribution of prizes taken before the war, the property of which was vested in the *King* (and so of those taken after the war, till given away) directs it to be paid to and among, &c. in the same manner and proportions as by the first. If then the first is taken into the second, there will be no absurdity in construing this to proceed from the *King's* bounty: that he intended, as to the shares of the other officers, &c. to bind himself, that it should be equally divided: but as to the flag-officers, the proportions should be left to his own judgment according to their merits: amounting to the same, as if the *King* had at the head of his army said, he gave the whole plunder to his officers and soldiers; he might give it according to the merits.

As to the third instrument 1744, the first question is, whether the subject matter extends to the prizes taken under the general letters of reprisals before the war? The second, supposing it does, whether those words have in construction any retrospect? The third, if so, whether that retrospect can affect the rights of the parties?

As to the first, I am of opinion, it does extend thereto: the intent of it was to prevent disputes, and to settle the rights of the prizes. If this is

to be considered as an explanatory proclamation upon that in 1740, it consequently is so of the other in 1741, which refers to that in 1740, and amounts to the taking in the words thereof. But it is said, these prizes taken before war declared are not taken from the *enemy*: that is a refined distinction; it is true in general, the letters of *marque* and reprisal make not *bellum justum*, or a formal war, between princes; but of late the wars in *England* have generally begun in that manner. And it is a lower degree and kind of war; for these general letters are for general injuries to the *King's* subjects, which is the cause of war; and differs from particular letters of *marque*; under which the prizes taken become the property of the person to whom they are granted: these [163] under the general, accrue to the crown; which is a proof, that it is a kind of war. But it means *now* our enemies; so that it is in effect the same. The subject matter then of the last proclamation includes the prizes before the declaration of the war with *Spain*.

But secondly, if it has not a retrospect, it will not take in the prizes taken either before or after the declaration, before the issuing the proclamation. I am of opinion, it is sufficient. Was it to extend to future cases only, why are the words *have been* mentioned, as well as *shall be*? It is also to explain and settle; and all explanatory laws relate to precedent cases; and it is in all cases of prizes taken; which, as the words *begotten*, means *taken* or to be *taken*.

As to the third: whether they can have a *retrospective* effect, that is, operate in the cases of prizes taken before the proclamation issued; it being said, that the right was vested; if the plaintiff could make out that right of the first declaration, it is out of the *King's* power to settle the proportions, or alter it: but that depends on the reasoning above; the *King* not having excluded himself from declaring the proportions.

Then as to the remedy: there is no ground to come here for an account, the sum being certain: and therefore no necessity to decree for the plaintiff, if his right was stronger; being a mere legal right, which should be recovered at law; for it was a right vested, which could not be varied by the proclamations, the determinations in the courts of law have been, that the assignee may maintain an action against the agents of the captures, for money had and received to their use. Against the executor of Admiral *Haddock* the plaintiff cannot come, for he received it not for the use of the plaintiff; but against the agents, for paying it to a wrong hand.

The bill therefore must be dismissed: but not clear as to give costs. But I hope, this will not be followed with other cases of this kind, where there is an acquiescence, and taking under the *King's* bounty.

ALLEN v. PAPWORTH, *July 22, 1731, and Nov. 23, 1748.*

(Reg. Lib. 1730. A. fol. 479.) and (Reg. Lib. 1748. A. fol. 714.)

Bill in equity by husband and wife, who had a power of appointment for her separate use, submitting that the subject of it should be applied in payment of his debts by mortgage and otherwise, for which a decree passes, is tantamount to an actual appointment. The heir therefore, although *in being at the time*,* and not made a party to the original suit, was not permitted to unravel the accounts taken under that decree; but only to surcharge and falsify. Judgment creditor having procured an assignment of a mortgage, allowed to tack the amount and costs.

In this cause *Lord Chancellor (b)* held that if a *feme covert* having power to receive the profits of an estate to her separate use, and to appoint them as she pleased (c), brings a bill jointly with her husband for an account, and submitting that the profits should be applied to the payment of the husband's debts: for which a decree passes: that bill, to which she was made party without collusion, is as much an execution of her power as an actual appointment would have been; and the profits shall be bound by the decree.

[164] And the bill being properly bought by husband and wife, when no other person was intitled (1), the account taken shall be binding on any contingent remainder-man, when his title afterward vests: nor shall he open it, unless fraud or errors are shewn therein: for thereby accounts upon mortgages, to which all, who could claim the equity of redemption, were parties would often be infinite: although if a reasonable objection be made against it, the court will so far open it. But the court will only give leave to surcharge and falsify this account; which often happens upon settlements, where there is tenant for life, with limitation in remainder, upon a bill for an account, when none but tenant for life is in being, a child afterward coming in *esse* shall only have liberty to surcharge or falsify, if no fraud.

* It appears from the subsequent bill of the son *that he was in being* at the commencement of the proceeding in question, and it is not contradicted in R. L. The report in *Vesey* seems inaccurate as to that fact. Editor.

(b) 2 Vol. 191.

(c) Such bill reckoned the bill of the husband. 2 Vol. 666.

(1) The reporter was under some mistake as to this. See head of the case.

WORTLEY v. PIT, *Nov. 23, 1748.*

(Reg. Lib. 1748. B. fol. 12.)

Plea—£2000 lent on condition to pay in a year £200 and the principal, or £250 *per ann.* during borrower's life: not an usurious contract.
Averment necessary to support such a plea.

AGREEMENT in consideration of £2000 lent by the plaintiff with a bond and condition, that if the defendant within a year paid £200 and the principal, or £250 *per ann.* during the life of the defendant, then, &c. (d).

(d) 2 Vol. 142.

To the plaintiff's demand on the latter part of the agreement, for non-payment of the annuity, or securing it out of land, as by the agreement obliged, the defendant pleaded the statute of *usury* in the bar; the money being to be paid within a year, together with the principal. To this plea, two objections were taken; one as to the form; the other to the merits.

Master of the Rolls, for Lord Chancellor.

As to the first, his honour held, that the plea was not, strictly speaking, right in point of form; for there should have been an averment, that this was above the rate of common interest.

But he did not found his determination on that, for supposing it rightly pleaded, the question was, whether the demand was within the statute of usury? and he was of opinion, it was not; although he was very unwilling to favour usurious contracts, or to encourage the getting out of the statute. Had it been, that the principal should be paid within a year, together with the annuity, it would have been another consideration. But this was all contingency; the defendant not being obliged to pay it then: and the annuity payable only during his own life, and then the money to be lost, and not repaid. Certainly if the borrower of money only agrees to pay an annuity determinable as this is, it is not an usurious contract: unless it was upon a contingency or condition impossible, or so remote as to induce the court to give it another consideration. But it is not so here; the whole being to be lost on the death of the defendant, is different therefore from the case in *Bro. Ab.* And the plea must be over- [165] ruled.

STONES v. HEURTLY, Nov. 25, 1748.

(Reg. Lib. 1748. B. fol. 554.)

Devise to trustees by sale or mortgage to pay debts, the remainder to go *and be equally divided* among three children *and the survivor* of them *and their heirs for ever*; a tenancy in common (1).

The law formerly favourable to joint-tenancies.

JOHN STONES having two sons and two daughters, and being seized of an estate in reversion, expectant on the death of his aunt *Mawhood*, and also of an estate in possession of less value; devised to trustees and their heirs the lands in question, upon trust, that they should, by sale or mortgage of any part, raise so much to pay all his debts, as his personal estate should not extend to, making the same liable thereto; the remainder of all his estate to go and be equally divided amongst his three younger children, *D. F.* and *M.* and the survivor of them, and their heirs for ever; making his wife guardian of all his children, and directing, that she should maintain and educate them out of the profits and rents of their several estates and fortunes given them by the will and settlement (2).

They all survive the testator.

(1) See *Hawes v. Hawes*, and *Mendes v. Mendes*, ante, 13 and 18.

(2) The words were "*or otherwise howsoever.*" R. L.

And for plaintiffs it was contended, that they took jointly by force of the word *survivor*, which should not be controuled by the precedent word. 2 *Bol. Ab.* 90. *Sti.* 211. and *Clerk v. Clerk*, 2 *Vern.* 323.

To which it was answered, that the cases in *Rol.* and *Sti.* were old, and before it was settled, that the words *equally to be divided* should mean a tenancy in common; for in grants and scoffments they made no alteration; being only the legal consequence of a joint estate, and no more than what the parties themselves might do. But after the statute of *Wills*, and the rule that the intent should be observed, notwithstanding unapt words, the construction came to be that the testator meant something more, and intended a tenancy in common; which the courts were induced to infer from its being unnatural to suppose he meant to disinherit the posterity of those dying first, and that he would startle at such a question put to him. In wills therefore, the courts have been *astuti* to construe *survivorship* into some other meaning than a joint-tenancy, unless the intention was plain that the survivor should take the whole; and in late cases have laid hold of some particular time to give the word *survivor* a sense. As in *Stringer v. Philips* (2), it was pinned down to the death of the testator, when the division should be made: in *Hawes v. Hawes*, Ante, 13, T. T. 1747, it was tied down to the dying under twenty-one. In *Blisset v. Cranwel*, Salk. 226, [and 3 *Lev.* 373.] those old cases are taken notice of, and that the inheritance there, being fixed in the survivor, shewed plainly, they were joint-tenants; but in this case it is not to the heirs of the survivor.

In the present case; it may be restrained to the time of the death [166] of the testator, or Mrs. *Mawhood*: and the direction for the maintenance shews, the testator considered them as having several estates.

Replied: that an implied division shall not controul express words of survivorship; *Stringer v. Philips* in particular, a case being there put by the testator where the survivorship could not take place. In *Hawes v. Hawes*, [Ante, 13], there were negative words; and it depended on a reason, which holds not here. *Concessit cur.* The testator's death was not a probable time to have in view, nor the time when it was to be divided: as then the trust must wait till the death of Mrs. *Mawhood*. The reason of using of the word *several* is, that the guardianship is also of the elder son, who had an estate by the settlement distinct from the other two estates.

LORD CHANCELLOR.

To make a construction of this will, the circumstances of the family and the estate of the testator must be taken into consideration. His intent plainly was in this devise to make a paternal provision in nature of portions for these three younger children. I am of opinion, that they take as tenants in common.

Two things in general are to be observed in devises of this kind.

First, anciently, and before the great alteration in the law by the abolition of tenures, courts of law were very favourable to joint-tenancies, to prevent the splitting of tenures and services; but they have since very much gone off from that, and endeavoured as much as possible to construe it a tenancy in common, from the inconveniences of construing it joint: and from

that time allowance have been given to the words (*f*) *equally to be divided* to make a tenancy in common: although in grants to this day they will not. But courts of equity have long before been favourable to tenancies in common, wherever they could lay hold of any words to construe it so, from its being a greater equality, a better provision, and preventing estates from going by accident contrary to the intent.

Secondly, that both courts of law and equity have endeavoured to construe it in common, when the devise is for children and their posterity by way of portions: who would be disinherited by a survivorship; unless they did an act to sever the joint-tenancy. But this requires time and attention: for they must live till twenty-one to do it.

I am of opinion upon the reason of the thing and the principal authority, that the words *equally to be divided*, as they stand here, ought to prevail. It may be objected, that there might be a sever- [167]
ance: but they were very young; and two of them were daughters. If they married at eighteen, what provision could the husband rely on? for if she died before twenty-one, it would go to the survivors: and the children, if any, be stripped of all. For the defendants, it is endeavoured to make a particular survivorship, to answer the intent, and yet to give the words some force; according to the rule, that all the words shall have a reasonable meaning put on them, if possible. First, that it should refer to a surviving the testator: and if that could prevail, it might be reasonable as to the intent: but there are not words in the will to confine it so, and it is dangerous where the word survivor is used, to construe it a surviving the testator, without words indicating such intent, when probably he meant a survivorship among themselves. Secondly, that it should refer to a surviving Mrs. *Mawhood*; but neither will that construction serve; for it will be followed with consequences not answering the intention of the testator; making this whole devise to be suspended till the death of Mrs. *Mawhood*, nothing passing till then; whereas the intention was, that it should vest in them immediately; and that this, which was the most valuable part of his estate, should not be sold as a reversion, which would be a sale to a disadvantage. But it is like a devise of a reversion, or mixed with an estate in possession as here, to pay debts, and the residue to *J. S.* and his heirs; which will vest in *J. S.* immediately, and not suspend till the execution of the trust and payment of the debts; therefore, though this construction finds out a particular time, yet it does not answer the intent; which appears from the application of the profits of their several estates till twenty-one; and certainly they were to have the estate in possession so applied till twenty-one. I resort therefore to the determination of the three judges in *Blisset v. Cranwell*, of whom *Treby* and *Rokeby* were as good lawyers as ever sat in *Westminster Hall*. The ground of their resolution, which is right, is substantial, and not playing with words, but goes to the reason of things; and although, what *Justice Powell* says, is in general true, yet he founds himself upon a strait-laced rule, with which he sets out in the exposition of wills. The reasoning of the three judges is capable of the same construction in the present case; the word

(*f*) In cases of wills, these words make a tenancy in common. 1 Atk. 493, 494. 2 Atk. 122. 3 Atk. 525.; and also in deeds which operate from the statute of Uses, 2 Vol. 252. 371. 1 Wils. 341. 1 P. Wms. 14. *Secus* in Common Law Conveyances, 2 Vol. 257.

heirs relating to all of them, and cannot be confined to a single one, viz. to his or her *heirs*; the inheritance not being in the survivor, as it would be if so, but in all of them; otherwise the inheritance would be in abeyance. The difference being, that in a grant, *habendum* to *A.* and *B.* and their heirs, they are joint-tenants; but the inheritance is in both: but if the *habendum* be to *A.* and *B.* and the survivor, and the heirs of such survivor, till the death of one, the inheritance is in abeyance. I do not know, whether the observation of the direction of the maintenance will go so far as it is argued for the defendants; because it is not confined to the will; for then it might be material.

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CARTER v. CARTER, Nov, 26, 1748.

(Reg. Lib. 1748. A. fol. 610.)

Devise to trustees from and immediately after determination of precedent estates, to use of *A.* in fee, charged and chargeable with legacies, to be paid in twelve months; they run over all the precedent estates as well as the fee.

Charged and chargeable runs over all the particular estates, as well as the fee.

Construction to be made on the whole will.

Not material in what order the clause is.

JOHN CARTER, January 6, 1743, made his will devising the premises to trustees, their heirs and assigns, to receive the rents and profits, and to pay them to his wife from time to time, as they became due, whether covert or sole, to her sole and separate use, and that her receipts should be a sufficient discharge; and on further trust to permit her to charge the premises with £200 for such use, &c. or person, &c. as she, whether covert or sole, shall, by her last will, or any writing purporting a will, limit, direct, or appoint; and after her death to the use of a brother for life, and afterwards to another brother for life, *charged and chargeable as aforesaid*; and immediately from and after the determination of those estates, to the use of his nephew, his heirs and assigns for ever, *charged and chargeable with £100 a-piece to his six nieces, to be paid to them respectively within twelve months after his decease*, and to be raised by the trustees in like manner.

The testator being dead above twelve months, the nieces bring a bill for their legacies, and the question was, what estate was charged therewith; whether only the limitation in fee to his nephew, or whether they run over all the estates for life as well as the fee?

LORD CHANCELLOR.

This is a matter of some doubt on the construction of the will. It is oddly expressed; and there are words favouring the construction restraining it to the last limitation in fee; and yet if a particular reason can be shewn on the intention of the testator and frame of the will for dividing this charge from the other, it may answer the objection for the defendant. The general rule is, that *charged and chargeable* runs over all the estate, as well particular, as the fee; as suppose, at the end he had said, *charged with all my debts*; it would be a charge on all, and the direction within twelve months is an argument in favour of that intent; and shews, he in-

tended these legacies should take place in some way before the reversion in fee to his nephew; and therefore they cannot be put on a level, as he has not said it. One or other of these constructions must be; either that this is a charge on the whole inheritance, including the particular estates for life; or else on the reversion in fee, and to be raised by sale thereof, and if not sold, they must carry interest from the year. Therefore I will order it to stand over, to find, if possible, from reading it over, some light from other clauses in the will, for construing the clause in question.

Lord Chancellor delivered his opinion.

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I find, that very little can be drawn from the perusal of the will; therefore the question must be principally on the construction of the clause itself.

Taking the several parts of the devise together, I am of opinion, they are charged on, and ought to be raised out of, the whole estate; and not confined singly to the reversion in fee. They are clearly raiseable now; and therefore interest for them must be found; and if the estates for life are not chargeable, no interest can come out of the profits: therefore the reversion must be sold merely as a reversion; for it will not bear a mortgage. It is not probable, that when the testator has charged and expressly directed them to be paid within twelve months, they should be raised by sale of a reversion expectant on three lives; but if he has done it, that must prevail. The defendant would confine *charged* and *chargeable* to the last devise of the remainder in fee, from the words *immediately from, &c.* but the general rule is, that the construction must be made on the tenor of the whole will taken together: and it is not material in what order the clause is; the whole devise is comprised under one set of devising words; all that follows, being only trusts declared on the first devise in fee, and no new devise. That charge is as properly put in at the end of the whole, if the testator meant it should run over all, as in any other part. The meaning of dividing the charges was, that the legacies should be absolutely a charge; but the £200 only contingent and uncertain: depending on her power; which, he did not intend should be a charge on her estate for life. It is said, that it is not to be presumed, that this was intended to be a diminution of her estate for life: but from reading over the will it appears, that this is the only material thing appearing from thence, that this is not the only provision made for the wife; she having the personal and another real estate also in lieu of thirds.

These legacies are therefore to be raised out of the estate in question, with interest from a year after his death, at 4 *per cent.*

JOHNSON v. ARNOLD, December 5, 1748.

(Reg. Lib. 1748. A. fol. 160.)

Money considered as land to effectuate the general intentions of testator.

HENRY SEER by his will directs, that £4000 in money should be taken out of his estate to be raised by instalments of £500 *per ann.* to be laid out in government securities in the joint names of his executor and *George Johnson*; subject to the payment of two annuities and a debt; and when

the whole is so raised and fully paid, if *George Johnson* should be willing and desirous to have it laid out in lands, then he shall and may purchase therewith in the name of the executor and himself; the produce and profits of the said lands and tenements to go to *George Johnson* for life; and afterwards to his wife for life; and after their decease, to the eldest son of *George Johnson*, to be begotten upon her, that shall be then living: and if the said *George Johnson* should die without such issue male, then the profits of the said lands to be equally divided among the daughters; and if the wife should die without leaving any issue by *George Johnson*, or any future husband, then £1000 and other legacies out of it to the present defendants; the remainder to be divided among such as are his nearest relations. But if they should not purchase lands, it should remain in government securities, and be and enure to such purposes as if lands had been purchased.

Upon a bill brought by *George Johnson* it was contended, that it should be considered as money, and the remainder too remote; that it was dependent upon his election, whether it should be laid out in land or not; and that he had determined to have it in money, by a former bill brought by him two years after the testator's death, to have the £4000 raised, &c. upon which a decree was made: that it was not unreasonable to give a farther power to exercise his discretion for himself and his family; and if it was only a power as to the time, it would have been given to the executors as well as him.

For defendant, it was said, that in all events it should be laid out in lands; but left to the election of the plaintiff to postpone or accelerate the purchase only: and that it was not material, that the words were not imperative on him to purchase; for in a will desiring an executor to pay, it is looked on as a gift.

LORD CHANCELLOR.

This will is penned in an obscure and blundering manner; and there is some difficulty in the construction of it. But something in respect of the intention is very plain. First, that let the construction of the limitations be what they will, these charges should take place on failure of *George Johnson* and his family. Next that, though not laid out in lands, the same person should have it. Then I am of opinion, that the construction for the defendant will best answer the intention, and consistent enough with the words: though they are not absolutely clear. The construction for the plaintiff would be absurd; putting it in his power to vary the rights of the parties, and to determine whether these limitations should take effect to the prejudice of his family or not; and he might eventually by that means give all to himself. For if it was money, and he had a daughter, who died, (as in fact it happened) it would all go to him.

[171] Supposing he had an election; the bringing that bill would not determine it; for it was before the payment of the whole was completed; before which time it was not to be laid out in lands: and part of the relief then prayed shews it was not then raised (g). Devise of the profits of lands is a devise of the lands themselves; and it was meant, that the eldest son should have the inheritance. But if by accident these

were all but estates for life, it is no objection against the charges claimed by the defendants, which would equally arise; and are charges on the reversion in fee. It is truly said for the plaintiff, that it is out of the testator's power to make money go as land, unless the court can consider it as land: and to comply with the intention of the testator, it is reasonable to expound this clause so, that he meant it as land: and it must be taken so throughout.

BRYANT v. SPEKE, Dec. 6, 1748.

(Reg. Lib. 1748. A. fol. 156. Entered *Bryant v. Gould*.)

It was the rule in Lord *Hardwicke's* time, to give interest at 5 per cent. on legacies out of personal estate, and 4 per cent. out of real (1). It has now long since been altered, and the general rule is, that they shall all carry interest at 4 per cent. from the end of a year after the testator's death (2). The case of maintenance is an exception (3).

Upon a question what rate of interest legacies should bear.

Lord Chancellor said, that the general rule is, that legacies out of real estate carry one per cent. lower than the legal interest; but if out of personal estate, because of the higher interest of money than land, it shall carry the legal interest, unless particular circumstances induce the court to vary therefrom: but for that, a special case must be made.

The reason of this is, that the *Ecclesiastical* court would give the legal interest on legacies out of personal estate, as those in question were; and the difference of the jurisdiction, in which they are sued for, shall make no alteration.

(1) See 1 Ves. 277; and 2 Ves. 239.

(2) Vide *Sitwell v. Bernard*, 6 Ves. 520, 543, 543, where Lord Eldon, C. disapproves the court's going further on particular circumstances, (except as to maintenance).

(3) *Sitwell v. Bernard*, 6 Ves. 520

DUKE OF LEEDS v. POWELL, Dec. 7. 1748.

(Reg. Lib. 1748. A. fol. 110.)

Bill in equity lies for payment of an entire rent out of a manor, where there are no demesne lands on which to distrain (1).

But it seems that the lands must be indisputably of greater value than the rent.

A manor may be in reputation, though not demesnes. Which pass by the word *manor*. Exception repealing a whole grant is void (2). King may reserve rent out of an incorporeal thing.

Where from confusion of boundaries no remedy by distress, the court will relieve (3).

THE bill was brought for the arrears and growing payments of the rents of a manor (h), granted by the crown to the ancestors of the plaintiff.

(h) Bill does not lie against several tenants of a manor, for quit-rent, as there can be no issue between any two of the parties; but where many claim one right in one subject, such a bill may be to put an end to litigation. 1 Brown, 200.

(1) See *Pulteney v. Warren*, 6 Ves. 73.

(2) See *Bradley v. Peizoto*, 3 Ves. 324.

(3) See *Duke of Leeds v. Earl Strafford*, 4 Ves. 180.

LORD CHANCELLOR.

Two questions arises from this case: First, whether the plaintiff is intitled to this rent, as one entire rent under a grant of K. C. 2 to Lord Danby? Secondly whether under the circumstances, he is intitled to relief here; or to be left to his remedy at law?

[172] The first depends on this, (which will determine the whole) whether the rent reserved on the grant by *King Charles* was one entire rent *de novo*, and then created; or as reservation, by way of exception to the crown, of the ancient quit-rents payable by the tenants of this manor to the crown? and I am of opinion, that it is the first. A manor in notion of law consists of demesnes in the hands of the lord, and services. It is admitted on both sides, there were no demesnes of this manor; though there were services. There may be a manor in reputation, though no demesnes. The *King's* grant is in the most general words possible; but the word *rents* is particularly mentioned: although without that the word *manor* would have done; so that the demesnes, if any, would pass to the grantee; and the services also; consisting in quit-rents, seignior rights, and casualties; which, though they seldom happen, are to be taken into consideration, when a manor is granted. Was this otherwise, the crown must have accepted them, and nothing would pass to the grantee: and then the rule of law is, that an exception repealing a whole grant, and contrary thereto, is void. Where the *King* grants rent, or perhaps land and rent, reserving thereout rent to his heirs and successors, it is good; as the *King* may reserve out of an incorporeal thing, and it may enure out of both: but in the case of a common person who can not do so, it would all arise out of the corporeal.

Then as to the remedy, the plaintiff's right being clear: and it is truly said, that if he has remedy at law, he should not come here; but he has none; for there are no demesne lands on which to distrain, and he is a mere grantee of the crown under the great seal, without the aid of parliament; and can have no remedy against other lands, which is the prerogative of the crown, or against the person of the defendant, and is therefore substantially and materially in the same condition with a person bringing a bill on the usage of payment, where he cannot distrain, because the particular lands cannot be fixed on, from a confusion of boundaries, &c. so that he cannot find out a fund for the distress (i): in which case, although he has legal title, the court will decree for him by way of assistance of his right. But the great difficulty is what sort of decree to make; whether it ought to be personally against the defendant, without entering into an account of the profits he has received; for in the cases where the court has decreed the arrears and growing payments, which is prayed here, they have been where indisputably the lands were of greater value than the rents. But as there are no demesnes here, or certain profits, but these quit-rents, the defendant might be charged beyond what he received; which would sound harsh in a court of equity, to give a remedy to do a great injury: like the case, where one comes into a court of equity for a remedy for rent, and the land does not produce that rent. I will therefore take time to frame a decree.

[173] It was afterwards settled.

(i) If terre tenant confounds the boundaries to prevent a distress, the lord will be intitled to a commission, 1 Brown, 201.

Not. The demurrer, for the plaintiff has remedy at law, was over-ruled 17th of *March*, 1745.

For the plaintiff had been cited *Cook v. Smeed*, in the *Exchequer*, which was a bill by a vicar, who had a pension granted out of a rectory appropriate, the payment of which had been discontinued, against a purchaser, who was decreed to pay the arrears even previous to the purchase as well as the future payments; and affirmed in the *House of Lords* (1).

(1) 2 Bro. P. C. 184. oct. edit.

LLOYD v. BALDWIN, Dec. 9. 1748.

(Reg. Lib. 1748. B. fol. 85. entered as *Lloyd v. Garth*.)

Purchaser or mortgagee under a decree for sale or mortgage and payment of creditors, answerable for the application of the money, if not paid into court. So also if the debts are specified in a schedule, &c. by the will.

A DECREE was made, and directions for a sale or mortgage, with approbation of the master; and that the money raised thereby should be applied for payment of the debts: and a report was made ascertaining these very debts by schedule.

Instead of applying as the decree directed, it was mortgaged to the defendant; but upon recital of the bill and all the proceedings thereon, the money was paid to a trustee named by the defendant, upon trust to pay it over to the creditors; with covenant by the trustee to the defendant.

For whom it was now insisted, that the estate was not liable in his hands to the demands of the plaintiffs: but that supposing it liable, it was only in default of payment by the trustee; against whom the plaintiffs should be first turned.

LORD CHANCELLOR.

If the court should not hold this estate in the hands of the mortgagee to be liable, it would be vain hereafter to make such a decree for the payment of debts; for then any person might afterward purchase with full notice, pay the money, and the creditors go without any satisfaction. It is true, it is an established doctrine, that on a trust or devise for payment of debts in general, without a specification of the debts in a schedule, a purchaser would be indemnified, and not obliged to see to the application of the money, or look after the creditors; which is in support of the trust, that the estate may be sold. But if there is such a specification or schedule, a purchaser or mortgagee is bound to see the application of the purchase-money. So where there is a decree, which reduces it to as much certainty as such a specification: for the purchaser does not pay to the trustees in such cases; but must see to the application, and take assignments from the creditors: otherwise the purchaser applies to the court, and that the money should be placed in the bank, and not taken out without notice to him; the reason of which is, that it is at [174] his peril.

As to the order in which he is liable; they cannot, by what they have

done among themselves, change the security of the creditors; for that is reversing things: he was the defendant's own trustee; and possibly after satisfaction against the estate, the mortgagee may come against the trustee, from whom he took covenants.

CUNNINGHAM v. MOODY (1), [10 Dec. 1748.]

(Reg. Lib. 1748. A. fol. 150.)

Money by marriage articles to be laid out in land, to uses of husband and wife for life, then to the children, as they should appoint; in default of appointment equally; if but one to that one in tail, reversion to husband in fee. One daughter: the trustee pays it to her and her husband; she not being *sui juris*, not separately examined; the payment sufficient to make it considered as money, and sister of the half-blood may claim the reversion in fee from the father: but the husband of the other sister, who was tenant in tail, will be tenant by courtesy.

The power of appointment puts not the inheritance in abeyance.

Where money considered as land, and when not; and where decreed to be paid.

By articles in consideration of marriage, £500 were agreed to be laid out in the purchase of freehold lands of inheritance, to the use of the husband for life; remainder to trustees during his life, to preserve, &c. then to the wife for life; then to all and every child or children to be begotten by the husband on her body, for such estate, &c. proportion, &c. as the husband and wife during their joint lives, by any writing under hand and seal, and attested, &c. should appoint; in default of a joint appointment, then as the survivor should appoint: and in default of appointment, to be equally divided among the children, if more than one as tenants in common, with cross remainders and benefit of survivorship: if but one, then to that child and the heirs of the body; in default of such issue, to the husband, his heirs and assigns for ever.

They had issue one daughter, who married the defendant: there was no appointment. The trustee paid this £500 to the defendant and his wife; who received it as money; for which they gave a release, but upon recital of the articles.

The bill was brought by a daughter by a second marriage, against the defendant, representative of his wife, the daughter by the first marriage, for this £500, which should be considered as land: and that the reversion in fee, vesting in the father, her half-sister continuing tenant in tail only during her life, was never seised of that reversion: the plaintiff must claim it as heir to her father, and is not to take it from her sister, from whom, being of the half-blood, she could not claim: like the case of *possessio fratris*, &c. A person claiming by descent after an estate tail, must make himself heir to the first purchaser, if it is a remainder; or to the donor, if a reversion; and not to an intermediate person to whom it descended; notwithstanding that person might have done what he would with it: as the sister, being tenant in tail, might here. *Kellow v. Rowden*, 3 Mod. and Carth. 126, and *Giffard v. Barber*, November 21, 1740, where

[175] Dr. Carew settled an estate on himself for life, with remainders to his sons in tail, reversion in fee to his own right heirs: one, seized of the estate tail, and the reversion, confessed a judgment; the

(1) As to this case, see per Lord Leoughborough, C. 2 Ves. jun. 707.

entail descended to others; and then the reversion coming into possession, the question was, whether it was affected with the judgment; and that it was not, *Kellow v. Rowden* was insisted on, because a reversion in fee was not assets; but his lordship held, that it was liable to be granted, charged, or leased: and that a lien might be created on it by statute or judgment; and that *Kellow v. Rowden* was not applicable, because the question turned on the manner of pleading.

For defendant: his wife having it in her power, even by fine, to bar the limitations, upon a bill brought by her, the court would have decreed the money to be paid to her; and therefore the trustees voluntarily paying it to them, makes no alteration. That money to be laid out in land, should be considered as land, is but a fiction of a court of equity, and not an universal rule; for it may be devised by a will with two witnesses; what is contended for, might be mischievous; for it would be difficult to say, how long this should continue, as it might go to several others in succession.

LORD CHANCELLOR.

So it might in *Edwards v. Lady Warwick* [2 P. W. 171].

For defendant: no such interest vested in the ancestor of the plaintiff, as could descend to her; the reversion in fee never vesting in the father, because during his whole life, the inheritance, supposing a purchase made, was in abeyance; for as he might have limited it to any child in fee, and the provision over in default of appointment would be then out of the question, it was a springing use resting in suspense during his; if was held by his lordship in the case of *Lord Conway* (1), August 1740, that such a power to appoint prevented any thing from vesting during the father's life, so as to enable the plaintiff to claim from him by descent. And in this case, the father had no power to charge or alien, being tenant for life of the whole; and his appointee would take it paramount to any such alienation by him. But if it is to be considered as land, the defendant having had a child will not be hurt by the laches of the trustee, but is intitled to be tenant by courtesy.

LORD CHANCELLOR.

I have no difficulty, unless on the authority of *Lord Conway's* case, which I do not remember: my present thoughts are these.

The first and fundamental question, upon which all will turn is, whether this is to be considered as land or money? for if the latter, the plaintiff's claim is at an end; but clearly, according to all the rules,* it must be taken as land; as it certainly was at first, and after the marriage had, being bound by the articles: the acts done are not sufficient to have it considered as money. (k) Upon a bill by tenant in fee, [176] the court would decree it to be paid in money, because he might immediately sell the land, and turn it into money; and the old rule was,

* 2 Brown's Chan. Ca. 56. 5 Brown's Parl. Cas. 269, even as to collateral heirs. 1 P. Wms. 110, 172. Prec. Chan. 400.

(k) 1 P. Wms. 130. 2 P. Wms. 173. Atk. 453. 3 Atk. 447.

(1) Barn. Ch. 153. Et vide post, 259, 261, and 2 Ves. jun. 707.

that the court would also decree it so upon a bill by tenant in tail, with remainders over. And thus it stood till the case of *Colwal v. Shadwell*, 1 P. Wms. 471, 485, where Lord Cowper held, the remainder-man should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of tenant in tail in that case before a recovery, shewed the remainder-man's interest in so glaring a light, that it has established the precedent ever since (2). (l) But where the remainder can be barred by fine, the court will decree it in money (3); but here was tenant in tail, reversion in fee in one moiety to herself: and therefore certainly if she was *sui juris*, and brought a bill for the money, a moiety would be decreed to be paid to her, the other moiety to be put out at interest, to go as the profits of the land would; but here she was a *feme covert*; and then the rule is, that although she had the reversion in fee of the whole, it should be laid out, unless some further act was done, by her coming into the court to be solely and separately examined, analagous to the form of a fine at law; and then if she declared her consent to have it in money, without the influence of the husband, the court would decree it so: if she was in the country, and could not come, there would be an order in nature of a *dedimus potestatem* to examine her there, which would take up time; the payment of the money therefore to them, she not being *sui juris*, is not equal to a decree of this court: nor is the release sufficient to cause it to be taken otherwise than as land, not being equal to a fine, or sole and separate examination, declaring her free will (m); nor can it change the equitable quality, this money has gained, of being considered as land.

Next as to the consequences of this. The first is, that, as she would be tenant in tail of the land, and had the same interest in the money (n), the husband surviving, is intitled to be tenant by *courtesy*, according to the case of *Sweetapple v. Bindon*, 2 Vern. 536, although the court does not give that indulgence in the case of dower.

Next as to the inheritance: and if the plaintiff must claim this reversion in fee from her sister, she cannot have it: because being but of half-blood to her, she cannot be heir. But I am of opinion, that she may claim it from her father, who took also an estate for life by the same settlement; so that according to the ordinary rules it vested in him: and whoever takes afterward must take through him. It is certain, that were no person is seen or known, in whom the inheritance can vest, it may [177] be in abeyance: as in a limitation to several persons, and the survivor, and the heirs of such survivor; because it is uncertain who will be survivor; but the freehold cannot, because there must be a tenant to the *præcipe* always. The fee's being in abeyance has in some cases occasioned an act of parliament to remedy it; but here it was not

(2) See 40 Geo. 3. ch. 56. Lord Eldon's act.

(3) See *Trafford v. Boehm*, 3 Atk. 447.

(l) In 3 P. Wms. 13. Lord King would not decree so, and said he ought to regard the issue in tail as well as the remainder man, and leave him his chance, for a fine is a thing of time.

(m) Where a sum of money is in the hands of one, without any other use but for himself, it will be esteemed money and the heir cannot claim. 1 Brown, 238.

(n) There must be a seisin in law or equity to intitle husband to be tenant by the courtesy. Post, 307.

so : nor does the power of appointment make any alteration therein, for the only effect thereof is (o), that the fee which was vested, was thereby subject to be divested, if the whole was appointed ; or if part, so much, as was not drawn out of the inheritance, still remained in the father as part of the old fee. And there is no occasion to put the inheritance in abeyance ; which the court never does but from necessity, and will so mould it by opening the estate as in *Lewis Bowle's* case and several others, as best to answer the purposes of the limitations. But if the appointment was not made, it remained undisturbed.

Then the question, if it can be called one, is, whether this reversion, so vested in the father, can descend to the plaintiff, sister of the half-blood ? and I think it may, according to *Kellow v. Rowden* and other cases ; for where not clothed with possession, it follows the rule of *possessio fratris*, &c. although it is not exactly the same case ; and the determination in *Kellow v. Rowden* comes up to this. It was there held to be sufficient to make himself heir to the person, in whom it first vested, without mentioning the intermediate persons who never had the actual possession of the fee, but barely the reversion ; although they might have charged, conveyed, or aliened it ; and the court never is sorry to see this happen between brothers and sisters of the half-blood by the same father ; it best answering the intention and rule of nature.

Plaintiff therefore is intitled to this money, which must be considered as land ; but the defendant is intitled to it during life. But this not so clear a case as to give the plaintiff costs out of the defendant's interest.

(o) 1 P. Wms. 516. Fearn, 275. 2 Roll. Abr. 418.

OGLE v. COOK, December 10, 1748.

(Reg. Lib. 1748. B. fol. 22.)

In a suit to establish a will in equity, all the witnesses to it should be examined, or proof given of their deaths (1).

UPON a bill for establishment of a will and performance of the trust, it was objected, that only two of the witnesses to the will were examined, and some account ought to be given, why the third was not : as that he could not be found, &c.

Lord Chancellor held it necessary to the establishment of a will ; for if after the decree the heir at law should controvert it, the court would order an injunction : nor did he care to make a precedent to the contrary ; for if this other witness was called, he might say something material against it : and therefore ordered it to stand over till the [178] third was examined.

(1) Vide the notes to *Grayson v. Atkinson*, post, 2 Vol. 454.

WILLET v. SANDFORD, December 12, 1748.

(Reg. Lib. 1748. B. fol. 529. entered "*Willet v. Windowe.*") See Post, 226.

Devise before the mort-main act [1], and a codicil after it, not disturbing the charitable trust, but devising to the same use, and adding two more trustees, is not rendered void, although the codicil attempted to unite another piece of land in the trust. The codicil no revocation.

HENRY WINDOWE made his will December 13, 1734, devising the bulk of his real estate to three trustees on certain trusts, and some particular lands to charitable uses. In 1744 he makes a codicil; which, he publishes and declares, should be annexed to, and be taken as part of the will: and thereby making some alteration in the disposition of the trusts of the bulk of his estate, after reciting the devise to the charity, he devises the same lands, together with another piece of land, to the same three trustees and two others and their heirs, upon the same special trusts and confidences as in the will; makes some alteration in the legacies in the will, and concludes with the confirming all other parts of the said former will.

Upon a bill by the creditors and legatees, a question arose between the defendants, whether this trust for the charity can take effect?

For the heir at law it was insisted, that by the codicil the devise of these lands, both as to the legal estate and the trust, is revoked; and so being a new devise to five trustees for the charity, and made after the *mortmain* act took place, it was void, and the lands descend to the heir at law. The rule in the construction of that statute, and in the application of the cases thereto, is, that if it would then have been good, the statute makes it void for benefit of the heir at law; as was held by his Lordship in *Arnold v. Chapman*, 12 July, 1748, [Ante, 108.] neither in respect of the legal or equitable estate could the court say, this codicil was not a new devise of the whole. The whole fee at law is certainly altered; passing to different persons in different manners. The claim must be by them under the codicil; and in their five names must an ejectment be brought, and they must have joined in a conveyance. The adding more land, shews an intent to make a new regulation: although the argument in general is in favour of the intention; yet here the heir at law may take against it by the resulting trust. Revocation of wills in general are very easily effected in point of law; any act shewing a change of mind, though ineffectual in itself, will do it: of which there are several cases in *Montague v. Jefferies*. 1 Rol. Ab. 615, 616. Mo. 429. such as a scoffment without livery. In Lord Lincoln's case both below and in the House of Lords (1), it was held a revocation (2), though the uses intended thereby never took effect. So in a conveyance in a man's life-time, which, for want of a proper inrolment cannot take effect as to the charity, yet would be a revocation [179] of the will. A devise to A. and his heirs, and a codicil made after the statute devises it to B. In trust for a charity; that would be a revocation, and result for the heir.

(1) See ante, 36, and post, 225.

(1) 1 Eq. Ab. 411.

(2) See the Earl of Ilchester's case, 7 Ves. 370.

LORD CHANCELLOR.

Have you any authority for that? Suppose it was a devise to *A.* and his heirs: and a codicil give the same land to a monk and his heirs?

For the heir: That would be a revocation, as the feoffment would: for the trusts being void as to the objects, makes no difference in law or equity as to the revocation. *Howard v. Howard*, was a very extraordinary case, which came out of the *North*: where one made a will in favour of a mistress, whom he afterward married publicly; and in consideration of the marriage settled the estate upon her in fee. Upon a bill to set it aside, it was held by your *Lordship*, that the will was very providentially revoked by the settlement, although the uses of the instrument could not take effect. It is not necessary to the revocation of a will or deed, that all or any of the uses should be changed; for another instrument limiting to the same uses would revoke the former; being sufficient to change the instrument; as by recovery, lease and release, or feoffment to the use of the will. It may be said, there are revocations in law, which are not held so in equity; as in a mortgage, which shall be considered in equity a revocation, only so far as the charge goes: but wherever equity does not consider that a total revocation, which would be so in law, it is, where the matter is looked on in quite a different light, from what it is in law: as the mortgage is considered here as personal estate, and a personal charge on land: but it is otherwise, where considered the same way here as in law: as in a recovery by tenant in tail to effectuate a will, it is a revocation of the will. The cases, where it has been held void by reason of the imperfection of the act done, (the statute of frauds requiring particular circumstances to revoke) as in *Onions v. Tryers* (1), do not come up to this; in which there is no defect in the solemnity of the execution, but an incapacity in the object. But the codicil is good, and cannot be esteemed a concurrent act with the will, so as to pass by both; the proper business of it being to revoke, as that is the effect of every alteration. By the *Roman law*, a codicil, not being so strong as a will, could not devise away the inheritance: but in our law it is a new devise. Suppose the will void, as if one of the witnesses was a legatee: it would take effect by the codicil.

LORD CHANCELLOR.

[180]

Then the codicil referring to the will, and being well executed according to the statute of frauds, would be a republication of the will.

For the heir: But still it operates as a new devise: as in case of a repurchase, it would be a revocation of the will, notwithstanding it was put in the same plight. It is admitted to be void as to the new devised lands; and the trust being to perform under the codicil, he could not mean, it should stand as the will.

For the charity: The intent is the whole of the case, for the revocation cannot operate, if an intent not to revoke is shewn: and revocations are never favoured. It is common to put an end to the legal estate, and yet leave the equitable to take effect: as if the trustee, to whom the legal estate is given, dies in life of the testator; it will not alter the trust: but

(1) 1 P. W. 343.

the court would carry it into execution; with this difference, that in one case the heir at law would be a trustee, in the other those named by the testator; and even on the foot of a charitable appointment, although no trustee at all, the court would carry it into execution, upon the statute of *Elizabeth*: so where the intent was to charge for the benefit of a third person, and the trustee dies. The difference between the legal and trust estate is only a fiction in law; the legal estate being only nominal. The codicil only meant to add to the trustees; not revoke the trusts: and may stand with the will, agreeable to the general notion of codicils. The express revocation in part shews an intent not to revoke, where not so expressed. A recovery by tenant in tail is a revocation, because the estate is thereby otherwise disposed of, and given to him in fee. So of the void instruments, plainly shewing an intent that the devisee should not take. *Arnold v. Chapman* is different; and would not have been so determined but from the peculiarity of the circumstances, and was from necessity, because it could go to no other than the heir.

Lord Chancellor said, that there being some nicety in the question, he would reserve it for consideration. See Post, 186.

WHARAM v. BROUGHTON, December 17, 1748.

Abatement and revivor.—Bill *pro confesso*.

Sequestration to compel performance of a decree abated by death of plaintiff.

As also the suit abates, a further act being necessary; so that a bill of revivor must be filed; no *sub. sci. fa.* as the decree was not signed and inrolled.

Fieri facias not abated by death of plaintiff; the right being vested. Otherwise of an extent where a *liberate* necessary. So of a sequestration, because a further act necessary.

THERE was a decree against *Broughton* for payment of a sum of money; for non-performance of which process of contempt issued against him: all which he stood out; and a sequestration, and seizure of his goods and of a leasehold estate; of which one *Hammond* had taken an [181] assignment from *Broughton* and *Steel* from *Hammond*. *Steel* comes in and makes claim of his interest; which is sent to the master to be examined; to prove which an order was made, that *Hammond* should be committed, unless he submitted to be examined. The possession of the leasehold estate consisting of an inn was ordered to *Steel*, who should give a recognizance with a condition for his answering for the value, and accounting for the profits made, in such manner as the court upon hearing the report should direct: and the order made on hearing that report was, that *Steel* should pay to the sequestrators what should be found due on that account. In the examination of *Steel* it was said, that *Broughton* told him, he intended to withdraw himself; but now there was an affidavit of his being beyond sea for about four years, nor was the decree against *Broughton* ever signed and inrolled.

The plaintiff in the cause dying, the question was, whether a revivor was necessary by his representative, the widow and executrix, to keep up the sequestration? if so, whether there were any circumstances in this case to dispense therewith.

LORD CHANCELLOR.

Considering the circumstances of the case, and the great delay, and bad behaviour of the defendant in the suit, I do not wonder that the representatives of the plaintiff struggles to have the most expeditious proceeding, and to prevent further delay by the forms of the court; and the same reason will induce me to assist her, if a foundation for it, as far as possible, consistent with the rules of the court. But unless on one particular circumstance, (*Broughton's* absconding) concerning which more evidence has been this day laid before me, there is no foundation to let this proceeding go on without reviving the suit.

The matter consists of two parts: the exception by *Steel*, coming in to be examined on his claim of interest; and the motion on the behalf of *Hammond* to discharge the order although no party, and admitting he has no interest, and is only brought before the court to clear the question of the claim of *Steel*. The order made on him was not in the strict form; but to assist the justice of the case, as there appeared to be a connection and collusion between them: *Broughton's* assignment to *Hammond* being near the time of his absconding.

It is insisted for the plaintiff, that *Steel* has not made the point of abatement one of the exceptions, although he has excepted to the merits: but if there is an abatement in fact, and a report made during that abatement, all this may be irregular, and the representative of [182] the plaintiff not have the benefit of it, notwithstanding all that has been done.

The first question is, whether there is a necessity by the general rules of the court, that the suit should be revived on the death of the plaintiff? The second question if so, yet whether there are sufficient circumstances in the case to induce and warrant a court of equity to go out of that rule, and to excuse the representative from reviving?

Upon the first two things are to be considered: whether the sequestration, issued to compel performance of the decree, abated by death of the plaintiff, and whether the suit itself abated?

As to the first, it is very clear (*p*) that it is abated; all the cases being to that purpose and none to the contrary. A distinction has been endeavoured between an abatement by the death of the plaintiff and of the defendant: and the cases cited are said to be of the death of the defendant: but there is no such diversity: and an abatement by a circumstance arising by the plaintiff is stronger. It is always so, where it is by act of the party: as in case of marriage by a *feme sole* plaintiff: she cannot bring her husband as party to the suit immediately, but must bring a bill of revivor*. Whereas by the marriage of a *feme sole* defendant it does not abate, but the plaintiff may proceed, only entering the name of husband

(*p*) 3 Atk. 594. and 1 Vern. 58. contra where it is held, a sequestration that issues as *meane process* falls with the death of the persons, *secus* where it issues for non-performance of a decree; but in 2 P. Wms. 621. it is held to be a *personal process* which abates by the death of the party, and therefore differs from an extent on a judgment which does not abate; also a sequestration takes in the whole profits, an extent only a moiety.

* The reason of this is, that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one not entitled to sue; but a defendant only justifying possession, the plaintiff cannot be injured by a decree against one holding that possession; but in the first case a neglect of a bill of revivor is not error to reverse a decree. Chan. Pleas, 22.

and wife in the suit. It is admitted, that if a decree be only executory, or *quod computet*, the death of the party abates; but it is insisted that this is an absolute decree, the suit at an end and executed, and the sequestration shall not abate. But this is not the rule of the court; for a sequestration being only laid on and never executed, not affecting the thing, but only a personal contempt for non-performance of a decree, by death of either party, (though the cases are generally of the defendant) it falls to the ground: as in *Bligh v. Lord Darnley*, 2 P. Wms. 619, and in the great case of *Colston v. Gardner*, 2 C. C. 43; where it is imperfectly reported; for Lord Nottingham's argument is very clear and well connected, as I have seen it in a manuscript of his own, wherein he refers to *Bland v. Witham*, before Lord Shaftesbury; saying, that after a sequestration laid on against a father, and land descends to the issue in tail, the sequestration is discharged, as in the case of Lord Athol. Whether it continued against the fee-simple lands, was not then debated; but he conceived it did not, unless the suit revived against the heir and executor, although the son came in during the father's life, and set out a title by conveyance, because after the father's death he has a new title as heir. So in *Burdet v. Rockey*, in 1682: where the bill set forth a suit against the late husband of the defendant; and a decree in his life; and that for not obeying, contempt issued against him; and sequestration against

[183] the real and personal estate till satisfaction; and he dying, the said commission was renewed by order of the court, and an injunction ordered: the bill was in aid of the sequestration. Demurrer thereto, for that by the plaintiff's own shewing the defendant being dead, the sequestration abated, it not being for the lands in question, or for any rent, or incumbrance thereout, but for a personal duty in disobeying the decree; and the rather for that after his death, no *subpoena* in nature of *sci. fa.* yet issued against the defendant and heir, whereby they might come in and make defence. The demurrer was allowed; and the injunction for staying the defendant's proceedings at law dissolved; so that a revivor was held necessary. So in *Hide and Ramshaw v. Greenhill*, August 1746, where it was taken for granted, that by the death of the defendant the sequestration abated; and the plaintiff brought a bill of revivor against the defendant's executors and residuary legatees. The question was only, how far the sequestration was revived against the lands or personal estate? and I was of opinion, that being a decree for a personal duty, it was only against the personal estate; and that the sequestrators should account to the heir at law for the profits of the lands received after the defendant's death: which is agreeable to the rule of law. This proceeding by dispensing with revivor is endeavoured to be shewn conformable to the rules of law concerning executions; but it is not so; as appears *Clerk v. Withers*, 2 Lord Raymond 1072, where it is held, and certainly is so, that if upon a *fi. fa.* on a judgment against the defendant, after the goods are lodged with the sheriff, which binds them, the plaintiff dies, the execution being begun, the *fieri facias* is not abated; the reason of which is, that in a *fieri facias* on a judgment the sheriff is directed to levy the money to the use of the plaintiff; as the words of the writ, *ad reddendum, &c.* shew; and therefore by the seizure of the goods and delivery to the sheriff, the property is changed: and though the writ commands to have the money in court at the day, the sheriff may pay the money to

the plaintiff; in which he is warranted by law, though he cannot deliver the goods over to the plaintiff; but if a further act and process of execution is necessary to be done by the court, the law is otherwise. Therefore if after such *feri facias* &c. the plaintiff died, and the sheriff levies only part, not finding goods enough for the residue, and returns so much toward satisfaction of the debt, *quod parat' habet*, a second *feri facias* may issue to levy the residue, but the executors cannot have it without revivor of the judgment. Whereas in the other case the death of the plaintiff afterward makes no alteration; the right being vested by the execution laid on the goods, according to the opinion of *Kelyng*, 1 *Lev.* 282. But *Holt* distinguishes all this from the case of an extent, *Cr. C.* 450. by which no right was vested; a *liberate* being necessary: which comes near to the case of a sequestration: which partakes not of the [184] nature of a *feri facias*, but of a writ of *extent* on a recognizance or *distringas*; vesting no right in the party, because the execution is not complete, but a further act of the court necessary; which whether by process or order makes no difference: and that further act is, that after seizure by the commissioners of the goods and profits of the lands, and return to the court, the party must apply to the court, to have an account of the sequestration taken, and an order made for sale of the goods toward satisfaction of the duty decreed him: without which he cannot have it. For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff, but only to detain and keep in their hands till the sum is fully paid, the contempts cleared, and the court make further order to the contrary. It is not of a great many years standing, that the court has ordered goods to be sold, to satisfy payment after a decree; but it is very lately, that the court has ordered it for a collateral contempt in proceeding before a decree; which the court now does in aid of its proceedings. By the plaintiff's death therefore before that further act, something must be regularly done by the executor to revive the process and suit; the party having a right to make a defence thereto; for he may set up some collateral bar; as in the case of a will, he may deny the seal of the ordinary; and the law-books suppose he may be able to shew a release. To that it is said, that this might be material, if the present proceeding was against the defendant, which it is not, but against *Steel*; to prove whose interest *Hammond* is ordered to be examined: but that does not prove the defendant to be out of the case. The sequestration is the foundation, which if abated, that examination is gone also; like the proceedings in the *Ecclesiastical* court, from whence this court might have taken it; where if a stranger to a suit intervenes for an interest supposed, by abatement of that suit there is an end of the intervention, which is tacked thereto. As this is so from the nature of the proceeding, so it is from the end and intent thereof; it being to shew whether these goods belong to the claimant or defendant; and if in the event the court should think the claim not proved, they are condemned, and directed to be delivered over to the sequestrators, as belonging to the defendant, who is therefore as much concerned, as if the proceeding was against himself, and will not vary the case.

The second consideration is as to the abatement of the suit. In general, after judgment there is no abatement in that suit: but here a further act is necessary; and the falling of the sequestration shews, there ought to be a revivor of the decree; and this court revives its decrees, as courts

of law do judgments. The question then is, in what manner the revivor should be; whether by bill, the common way, or by *subpœna scire facias*, which issues out of the record of the decree; and can only be where the decree signed and inrolled? So that there is no other way in this [186] case, but by bill in the regular course, which will revive the sequestration and decree, when properly brought on.

But for the plaintiff such difficulties are suggested, as amount almost to impossibilities to come at her right; which leads to the second question; that supposing the general rule laid down be right, that the sequestration abated, and a revivor necessary; yet here the representative should be excused from that difficulty, for two kinds of reasons. First, the order and security by *Steel* to answer the value: but nothing therein to take it out of the common rule; for if *Steel* proved not his claim, the order not being that it should be paid to the plaintiff, the plaintiff must still make a further application to the court for payment; which brings it within the rule and distinction already laid down; and though possession of the leasehold in mean time was delivered to the claimant, that was only for the carrying on the trade; yet still the sequestration continued. But the second and principal reason is from *Broughton's* being beyond sea for four years; so that no benefit could be by bill of revivor, because of the *proviso* in the statute of 5 *Geo. 2. cap. 25. sect. 8.* which says, that no decree for want of appearance shall be, unless an affidavit that the defendant was within the kingdom within two years next before the proceeding against him: which indeed creates a great difficulty; for as this decree is not signed and inrolled, there can be no *subpœna scire facias*, for if there could, I apprehend, it would help the plaintiff, and that the decree might be revived without appearance; although that is not clear on the practice; there being no precedent of it. The command of the writ is, that you personally appear in *Chancery*, and shew cause why, &c. on a certain day; it is true, on this an appearance is sometimes entered; but suppose a *subpœna* so issuing to revive a decree, the defendant neither appears or comes to shew cause; I think (although no absolute opinion) there may be an order to revive. As on a *subpœna* served on an infant to shew cause within six months after coming of age, why a decree should not be made absolute; it shall be made absolute without entering an appearance, if he comes not. If you do not shew in your own affidavit, that the defendant is beyond sea, the court will not require an affidavit to be read, that he was within the kingdom within two years; but it will lie on him, when he returns, to shew that, and to impeach the proceedings, and then the court will put terms on him. But still the proceeding is open to great difficulty; and it is said, the court should not be so bound by its forms as not to come at justice. And certainly a court of equity does take sometimes very liberal steps; as in the abatement of suits, and applications for collateral things to be done, the court will, notwithstanding abatement by death of almost all the parties, make an order for delivery of deeds and writings; [186] or send to the *Master* for inquiry to whom they belong; or order money to be paid out of the bank without a revivor: as I believe I did in the case of *Sir Thomas Pendergast*. But that is, where the court must deliver itself from the custody thereof some way or other, and proceed *ex officio*: but the question here is upon a strict execution under a decree, and very different. But upon this point I will not now give any

certain opinion: but will expect some answer to this affidavit of to-day, and afterward tell the remainder of my thoughts; because if there is no answer thereto, so that the plaintiff may come at justice, I will as far as possible chalk out a method to come at it.

WHARAM v. BROUGHTON, December 20.

Bill *pro confesso* (1).

AN affidavit was now read of the defendant's being within the kingdom within two years.

LORD CHANCELLOR.

I was in hopes it would come out so. This will deliver the plaintiff from her difficulties; as she may now bring a bill of revivor: and if he does not appear, it will be taken *pro confesso*: and then if any difficulties occur, this affidavit will be a ground to go on.

The exceptions stand over.

(1) Vide *Geary v. Sheridan*, 8 Ves. 192.

WILLET v. SANDFORD, December 20.

Vide *Ante*, 178, 180.—Revocation of a will.

By devise to unlawful trusts the legal estate as well as the trust is void: unless part of the trust is good; for that will support the legal estate.

Our law as to wills borrowed from the civil law.

Difference between a codicil and a second will.

Lord Chancellor now delivered his opinion.

(9) If this trust for the charity can take effect, it must be by the will; for if by the codicil, being made after the *mortmain* act, it is void: and the single question is, whether the codicil is a revocation or confirmation of the will?

It is necessary to take notice of the different interests in land at this day. There are three kinds: First, the estate in the land itself; the ancient common law fee. Secondly, the use; which was originally a creature of equity, but since the statute of uses, it draws the estate in land to it; so that they are joined and make one legal estate. Thirdly, the trust; which the common law takes notice of, but which carries the beneficial interest and profits in this court; and is still a creature of equity, as the use was before the statute.

To apply this. By the will, the estate in the land, and the [187] use, are devised to the three trustees and their heirs; for a devise of land, by force of the statute enabling to devise, carries the estate in the lands, and the use too, without saying to the use of the devisee; but

(9) 2 Atk. 73. *Ante*, 32. Post, 190. Prec. Chan. 459. 2 Vern. 741. S. C. 1 Eq. Ab. 407. S. C. 1 P. Wms. 343. 1 Wils. 313. 2 Atk. 268: 4 Burr. 2512. Cowp. p. 49. 87. Dougl. 30. 684. In these cases it is held that the mere act of cancelling a will is no revocation, unless done *animo revocandi*. Vide 1 P. Wms. 345, note 1, 4th edit. where the law is collected from the several cases on this subject.

the trust and beneficial interest is to the charity. By the codicil, the estate in the land and the use is given to the same trustees and two others; the trust for the charity is exactly the same; but there is some variation of the surplus profits. It is undoubtedly a new devise of the legal estate; and therefore it was objected, that being subsequent to the *mortmain* act, it is void as well as the trust: but that was soon given up at the bar: because the variation of the trusts of the surplus profits, being good, is sufficient to support it: as it was held in all those acts, which on a devise to unlawful trusts make the legal estate: as well as the trust void: but with this distinction, that if part of the trust is good, it will support the legal estate: as upon the *Popery* act, if part of a trust is for a protestant as well as for papists; and then the only consideration of equity is, how far the trust is made void by the act?

Next I am of opinion, that the beneficial interest and profits, that is the trust, to the charity is not revoked, but confirmed by the codicil; which I ground first on the nature of the instrument: secondly from the words. A codicil made after a will, and directed to be annexed thereto, is considered both in our law and in the civil law: (from which we borrow ours, with regard to wills) as part of the will: although in notion of law there may be other codicils not part of the will: as in the *civil* law, a testamentary schedule, though no will at all: but this is part thereof, and therefore in its own nature is not intended to be a revocation of the instrument of the will (r); for there may be a revocation of the particular dispositions, and yet not of the instrument, but to be added and made part thereof; as in several parts of *Swin.* but particularly 15, (*the new edition*) this differs therefore from the case of a second will, which from the nature of the instrument has been held a revocation of the former, though no clause of revocation was inserted: and is different from *Hitchins v. Basset*, 1 *Sho.* 537, *Cases in Parliament*, 146; in which case it was admitted throughout, that though a man could die with but one will, he might with several codicils, and no revocation; and a strong authority is there cited, *Coward v. Marshal*, *Cr. E.* 721. even on a second will: the only doubt being that it arose on a second will; for had it been a codicil, there would have been no question, the instruments being part of one other, and to be taken together. Hence it follows, that as it stands clear of the doubt in *Shower*, it is so of revocations by act executed in life of the testator; as of feoffment without livery, bargain and sale not inrolled; the effect of all which is in the testator's life to defeat the act; confirming nothing,

[188] but altering the estate in his life; which a codicil does not; taking effect together with the will at the death of the testator.

Then as the codicil is no revocation, farther than it is expressed; so from the words there is no express revocation, but amounts to a confirmation of the trust to the charity, which must have arisen on the will, varying only the former part; *other parts* meaning parts not varied: which is the construction always put on the words. So that being made in 1734, it is not revoked nor contrary to the act; and must be established.

(r) A codicil revoking a legacy of £40,000 it being in fact only £30,000. and £10,000 an appointment, revokes the appointment. 2 *Brown*, 51.

HUGHES v. TRUSTEES OF MORDEN COLLEGE, Dec. 12, 1748.

(Reg. Lib. 1748. A. fol. 78. entered as "*Hughes v. Brand.*")

Garden grounds used for trade as much protected by the Highway acts, &c. as private gardens. Plaintiff, therefore, quieted in possession by injunction against the commissioners.

THE trustees had agreed with the commissioners of the turnpike, to let them dig gravel in land, which they had leased to the plaintiff for twenty-one years; and which he had turned into a garden. The commissioners entered, took possession, dug up the *legumens* planted, set a value on them, and made a satisfaction which the plaintiff accepted.

The plaintiff moved for an injunction, to restrain further digging; which was refused; because he had not made the commissioners parties; which having amended, he now moved it again.

LORD CHANCELLOR.

What the fruit of this injunction will be, or whether it will be too late to stop the mischief done, I know not: but the question is, whether there is not a case made by the plaintiff sufficient for an injunction; and there clearly is. This court, as well as other courts of justice, will certainly give great allowance to the acts of the commissioners of the turnpike; and will not interpose to censure them, unless in a plain case: but not where there is any ground of doubt, whether they had authority or no; for then the court will not interpose, till that doubt is removed, and the matter finally determined at law. But no such doubt is here; the plaintiff's right, and his remedy here being plain to me, though not to the defendants.

The turnpike act, and all these relating to highways, *except* messuages, houses, gardens, orchards, yards, planted walks; without limiting it to any particular kind of garden: which are as much taken out of their jurisdiction, as if they had none: and if they act contrary, they are as much trespassers as private persons. The only thing creating a doubt, was the plaintiff's acceptance of that sum in satisfaction: but that appears to be for a distinct matter; for the damage to his crop; not relating to the present question of his possession, and the commissioners became purchasers of that gross crop. They acted therefore without authority, [189] and are in the case of private persons entering by force into the ground, of which another had possession for twenty-one years; for which indeed there is a remedy at law: but that would be only for a particular wrong done, and not equal to the remedy in this court; in seeking which the plaintiff was right, and had a proper head of relief, being in possession at the time of filing the bill, and three years before; the reason of which is, that the statutes of *forcible entry* require it (1). To extend which statutes, the bill is brought for an injunction, for which he has made a proper case; the bill now before me being the amended bill, which is above three years after making the lease. There is no imputation upon the trustees; but however this should not have been done; being something like the case of *Naboth's vineyard*: and its being in a country, where it is

(1) Vide Stat. 8 H. 6. c. 7. 3. 6. 31 Eliz. c. 21. s. 3. and 3 Gwill. Bac. Ab. 245, &c.
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difficult to get gravel, is not a circumstance, that will extend the authority of the commissioners; and the plaintiff has been in possession all along: for repeated trespasses from time to time did not gain them the possession.

HAWKINS v. DAY, *December 21 1748.*

(Reg. Lib. 1748. A. fol. 115.)

Confirmation of master's report opened, and the report allowed to be excepted to, or reviewed, under particular circumstances; although previous exceptions had been disallowed after argument.

On petition that the master should review his report after exceptions thereto taken, argued, and the report confirmed by judgment of the court.

Lord Chancellor said, he never knew an order to that purpose; and it would be of mischievous consequence: but errors in computation merely, might be set right at any time (1).

(1) Notwithstanding the first impression of the court, it nevertheless acceded to the petition.

PARSONS v. LANOE, *January 28, 1748.*

(Reg. Lib. 1748. B. fol. 471.)

S. C. Amb. 557.—Will on a contingency. Devise in case of testator dying before his return from *Ireland*. Having returned, &c. the whole disposition ineffectual (1). Revocation by marriage, and birth of children.

The instrument of a will or codicil may be eventual as well as the disposition, and should not then be proved in court ecclesiastical.

A difference in the statutes of frauds between the penning of revocations of wills of real and personal estate.

Where an alteration of circumstances by having children after making a will; no strained construction should be to make the will effectual.

COLONEL CHARLES LANOE, intending to go to *Ireland*, made a paper-writing in 1732, declaring it to be his last will in manner following: "If I die before my return from my journey to *Ireland*, that my house and land at *Farly Hill*, and all the appurtenances and furniture thereto belonging, be sold as soon as possible after my death, and thereout all my debts and funeral charges be paid. *Item* £1000 to *A.* out of the said money arising by the said sale, and £100 to *B.* and after all debts, legacies, and funeral expences discharged all the residue of the money arising from the aforesaid sale, and all real and personal estate, interest in houses, [190] and all other estate, to my wife and her heirs for ever," joining her in the executorship with others.

He had then no children; and soon after pursued his intended journey to *Ireland*, where he continued some time: and after his return to *England*

(1) *Vide Sinclair v. Hone*, 6 Ves. 407.

had two children by her, a son and a daughter, and lived till 1738. He kept this will by him: nor did it appear, that he made any other (*); but there was evidence of his speaking to his friends of a will; shewing he did not intend to die intestate, of which he expressed some detestation. The will or paper was proved in the *Ecclesiastical* court.

The legatee of £1000 brought a bill for a satisfaction of his legacy; and in order thereto to have the real estate sold: to which the widow and infant son and heir were made parties. Upon which the general question was whether under these circumstances this instrument was to be considered as a will still subsisting? Under that, two considerations arose: first whether this will, either the instrument or disposition made thereby, is merely a conditional, contingent, instrument of disposition, depending on the event of his death before his return from *Ireland*, or whether absolute and subsisting in all events? secondly, supposing it absolute and against the heir at law; whether that great alteration in his circumstances, by having two children after the making it, will amount to a revocation or an annihilation thereof, so as not to be subsisting at his death?

LORD CHANCELLOR.

As to the first consideration, I think it was merely a provisional contingent disposition, and consequently in my opinion (though that is not now for my consideration) no part thereof was intended to take effect, but in the event of his dying before his return; in which view it was made.

It has been argued, that although the disposition might be made conditional and contingent: yet it was impossible to make the instrument so. If the entire disposition is made so, the consequence will be the same, but though it be truly said, that in the several chapters of *Swin.* of conditions, there is no instance of the instrument of the will being made eventual: I am very clear, without help of an authority, that a will or codicil may be entirely depending on a contingency, so as to have no effect, as an instrument of a will, unless that event happened. Nor should it be proved in the *Ecclesiastical* court. The case in *Swin.* depending on the return from *Venice* within a certain time, though not clearly the present case, is like it. The devise of the sale of the estate at *Farly* is admitted to be contingent: the question then is, whether this clause does not make the whole contingent? If only the disposition, not the instrument, be made contingent, it ought to be proved in the *Ecclesiastical* court as a will, and left to the proper courts to judge what effect that disposition [191] will have. It is rightly argued, that if the foundation on the part of the plaintiff be true, of the contingency's being only applicable to the direction for sale of the estate, nothing but that will fail, and the residuary devise will be good. But that construction cannot be made; the whole depending on the contingency first mentioned, and must be taken together; for if the estate at *Farly* cannot be sold, how can the plaintiff's legacy arise out of it? And it is admitted, that the £100 legacy is also to come out of the money arising by sale: and this is warranted by the words of the subsequent residuary clause: so that all was to be paid out of the money arising by sale; which sale was not to be made, unless he died before his return from *Ireland*; so that the whole disposition was provisional, only to take effect in that event,

And as to the instrument itself, if necessary to enter therein, there are words to warrant this; it being declared to be his will *in manner following*, so that it is not an absolute will. The penning of the will then being so, collateral or parol proof cannot be taken into consideration; which would be dangerous, and what the court since the statute of *frauds* is not warranted to do; for nothing will set it up but some act done by him after that event to republish the will, or defeat the condition.

This makes it unnecessary to give any opinion upon the second question: but as it greatly strengthens the construction upon the first, I will say a little to it. It must be taken, that the children would be absolutely disinherited thereby; because left in the power of their mother; although there is no doubt of her good intentions toward them. It has been endeavoured to rebut this, from circumstances of the family, *viz.* a settlement in 1755, of a real estate which came to her, and is alleged as a reason, why the testator might intend his will should stand; but the appointment of the proportions to the children appears to have been entirely in her pleasure; who might give the greater part to the daughter. It has not therefore the force of such a settlement, as vested an absolute estate in the son out of the power of the mother. This question relates to the real and personal estate. As to the personal: it is held in *Lug v. Lug*, 2 Sal. 592, 1 *Ld. Raym.* 441. (reported from Serjeant *Cheshire*, which is no bad authority) that marrying and having children afterward, is a revocation: and although it is said to be generally taken otherwise now; and that subsequent authorities are against it; and though I have heard it mentioned *obiter* by judges, that such a change of circumstances would be a revocation; I have not known any case or judicial authority to that purpose: but I will not give any opinion [192] thereupon; for if so settled by the *Delegates*, I will say nothing to disturb it. But there is a great difference even on the *statute of frauds*, between the penning of the two clauses relating to revocations of devises of land, and of personal estate. The first is an express exclusion of all other manner of revocations whatsoever; the other clause is only a limitation and restriction upon the method of revoking a will of personal estate by words or writing; leaving all other methods existing. But the words of the first are both negative and affirmative, excluding any other manner of revocation, as by accident, &c. There may be good reason in the difference taken between the marrying, and having children after the making the will (which is a total alteration of circumstances) and the having children only when married before: in which case the testator is presumed to suppose that by possibility, his wife may have children; which event is before his eyes at the time of making the will. Of this I give no opinion; but only mention it to shew the difference on the penning of the statute between revocations of wills of personal and real estate (1): but principally that however it be as to such an alteration of circumstances being a revocation, yet wherever there is such an alteration as this, no liberal or strained construction ought to be made of such a will, to make it effectual: but a court of equity and of law would give such a force to such construction, as would make the will contingent, to prevent such inconvenience as this (I mean in general) from taking place. The will therefore was a con-

(1) Devise of a college lease, afterwards the lease is renewed, the new lease does not pass by the will. 1 *Brown*, 261, 401.

tingent eventual disposition; which not having happened, neither the disposition of the real or personal estate can take place: and therefore this bill for the payment of the legacy thereout must be dismissed without costs: unless the plaintiff thinks he can establish this will at law; for it is not a question upon which I can make a case; depending on circumstances of evidence, which must be laid before a jury (1).

But there is a better way to take; and perhaps better to have come here, viz. To get a private act of parliament; for it is said, there are debts, which will go a great way to exhaust the estate.

All the difficulty upon the infant would be, that the *parol* would demur, which is often the ground of a private act; for otherwise an infant's estate might be eat up and ruined by what was intended for his benefit.

(1) The plaintiff having declined the proposal, the bill was dismissed; but without costs. R. L.

LEGARD v. DALY, Jan. 28, 1748-9.

(Reg. Lib. 1748. B. fol. 111. entered *Legard v. Lord Mountjoy*.)

Now a new trial where there must be the same issues, and no surprize, &c. on the former trial. Infancy no ground for it in such a case.

Verdict, founded on evidence discovered since the answer put in, and contrary to it, is not thereby prejudiced. Length of time, on an application for a new trial, a very great objection, both at law and in equity.

Or a bill to settle the question of heirship to the Duke of *Buckingham*, the defendants *Walsh* and *Daly*, in; their answer, claimed to be coheirs with the plaintiffs.

The court directed two issues: First, whether the plaintiffs [193] and the defendants *Lord Mountjoy* and *Mr. Shaftoe*, were the only coheirs at law of the *Duke*? The second, whether the defendants *Walsh* and *Daly* were coheirs? And if the jury should find any others to be coheirs, except such as directed in the issues, it should be indorsed accordingly.

Before the trial, the defendants *Walsh* and *Daly* discovered a pedigree in the *Duke's* own hand, not known or to be come at before, giving them a better title in exclusion of all others; upon which, seven days before the trial they moved to put it off, that they might be better prepared, and to have the issues rectified: but the plaintiffs opposed this, and the court refused it, upon its being so late, and other circumstances: but declared, this would be very proper evidence to encounter the plaintiffs on that issue: so that they proceeded to trial; and on this pedigree there was a verdict, that the plaintiffs and *Lord Mountjoy* and *Mr. Shaftoe* are not heirs at all: then that *Walsh* and *Daly* are not coheirs with others, but sole heirs.

Upon its being set down to be heard on the equity reserved, five years after the trial, the plaintiffs moved by leave of the court to have a new, or another trial; objecting, that the verdict is contrary to the answer, and to the intention of the court in the decree, and not warranted by the true sense and meaning of the issues: it was obtained on new evidence by surprize, against which the plaintiffs had not opportunity or time to make a defence, and consequently not sufficient for the court to make any direc-

tions in the cause. There appears to have been an attainder of one of the ancestors, from whom the defendants claim; but supposing this such a trial and verdict as were sufficient to satisfy the conscience of the court; yet one of the plaintiffs being an infant; that is a distinct ground, on which there should be a new trial; as in *Stapleton v. Stapleton*. Though new trials are discretionary, all the circumstances, upon which they are usually granted, concur: an infant's inheritance being to be bound; a question of land: of value, and doubtful; and there having been surprize; each of which singly has been held a sufficient reason. And supposing if the plaintiffs had come recently, they would be intitled; there is no laches; it not having been set down to be heard till lately.

LORD CHANCELLOR.

I would first observe, that whether the court directs a new, or another trial, it must be of these very issues here directed, and for no application on the part of the plaintiffs to vary them, or to rehear the cause; so that they contradict themselves, asking a second trial of these issues, which yet, they tell me, cannot determine the cause. As to its being
[194] contrary to the answer, where people are forced to claim by collateral descents under ancient pedigrees, which since the abolition of the court of *Wards* are not so well kept as formerly, (although greater advantage than inconvenience has resulted from that abolition) if by their answer they set out their pedigree so, as not to be strictly the same as it appears to be on the evidence; but it comes out better for them in fact, it would be holding very nice, should the court suffer their answer to prejudice them. Nor can I think it contrary to the decree: the intent of which was to take in the whole; so that if the jury should find any other persons in any other manner than therein described, it is found directly within the words of the second issue, and the meaning of the direction for the indorsement; which was that the whole right should be tried; nor was there any such surprise as to be a ground for a new trial; which, if granted, would make a most extraordinary precedent. The plaintiffs themselves, who now complain of surprise, opposed the motion for putting off the trial; and though infancy is sometimes allowed for a cause, as in *Stapleton v. Stapleton* (1); that is, where it is necessary to bind the rights of the parties; infancy being then an ingredient; but not in this case which would give infants a most extraordinary privilege of bringing a new bill upon coming of age, after having had as many decrees as they pleased during minority. If what is said of the attainder be true, it puts an end to all their titles; finding a title for the King, who would not be prejudiced by the verdict: but that helps not the plaintiffs, nor gives them a right: so that there is no ground for a new trial, if no more in the case.

But there is another reason, which weighs greatly with me, viz. the length of time, being five years and a half since the trial; which would be an objection even in courts of law; as in the case of the corporation of *Marlborough*, when I was *Chief Justice*; where upon a *mandamus* a new trial was refused after three years only, because they should have come recently: and although it was not set down till lately upon the equity reserved, it cannot be said, the other side should not have applied for a new

trial; for perhaps the defendant might have no reason to set it down.

The bill therefore must be dismissed with costs at law; but no costs in this court, because this pedigree and title was found after the decree.

JEANES v. WILKINS, Feb. 4, 1748-9.

[195]

(Reg. Lib. 1748. B. fol. 325.)

Debtor in custody on *Ca. sa.* sheriff seises under a *fi. fa.* and sells after the return of the writ expired, and no *venditioni exponas*; vendee assigns to the sons of debtor, who join in assignment to *Cole*.

The sale by sheriff is good; but an enquiry into the fairness of the transaction.

Purchaser under a *fi. fa.* may justify whether the proceedings regular or not.

Venditioni exponas a writ not of necessity.

Sheriff under *fi. fa.* has a special property, and the goods bound from delivery of the writ. in the case of a common person.

A CREDITOR having the body of his debtor in execution under a *capias ad satisfaciendum*, during the continuance thereof, the sheriff takes out execution under a *fi. facias*; seises a leasehold estate of ninety-nine years: but made no sale thereof, till after the return of the writ of execution is expired; then sells it; but no continuance of the writ of execution, nor any writ of *venditioni exponas*. The vendee assigns it in trust for the sons of the debtor, who join with the trustee in an assignment to one *Cole*; but there was evidence on the part of the plaintiff, that the debtor's family are still in possession. In contradiction to which, evidence was read, that *Cole* or his under-tenants are still in possession and receive the rents.

Three questions were made; two of law, the third of equity. First, whether this execution by *fi. fa.* issued out, was such as would authorise the sheriff to sell the term and assign it? Secondly, whether the sale by sheriff was regular by virtue of this writ of execution, so as to convey a good estate in point of law to the defendant *Cole*, supposing the whole transaction fair? The third, whether it was fair?

LORD CHANCELLOR.

To avoid the sale and title of the defendant it must be proved, that the *fi. fa.* was void, and conveyed no authority to the sheriff; for it might be irregular, and yet if sufficient to indemnify the sheriff, so that he might justify in an action of *trespass*, he might convey a good title, notwithstanding the writ might be afterward set aside. It is said, that by law, during the existence of the *capias*, and the person in custody, a *fi. fa.* ought not to be taken out; and certainly it ought not; although if the defendant dies, the plaintiff may have a new execution, as upon the statute 21 J. 1. yet while that continues, resort cannot be to any other execution; and the court, without putting the party to his *audita querela*, would (as I apprehend) set it aside on motion. But yet that *fi. fa.* was not void, and the sheriff might justify taking this leasehold by that writ: and so may the purchaser under the sheriff, who gains a title: otherwise it would be very hard, if it should be at the peril of purchaser under a *fi. fa.* whether the proceedings were regular or not; and the law is the same, although the *fi. fa.* issued in a different county from that, wherein the body was taken into custody.

[196] As to the second question : I am of opinion, that it did convey the estate of this term to the purchaser, although the sale was made after the expiration of the return of the writ : and no necessity for a writ of *venditioni exponas* ; which, though a proper writ, is not of necessity, being rather to compel the sheriff, when guilty of laches, to do what he has authority to do, than to give him a new authority. *Cr. J. 73.* proves it not of necessity, in case the sheriff is willing to do his duty ; where though it is not said, that the return was expired, yet the manner of stating the objection imports it ; for before that there is no occasion for a *venditioni exponas*. This authority must be considered and taken together with 1 *Lev. 282. Wilbraham v. Snow* ; where though the saying of *Keeling, C. J.* is wrong, according to the *quære* put there, the judgment of the court is, that the sheriff has a special property, sufficient to maintain the action ; the property being aliened out of the owner. The goods, by being lodged with the sheriff, were bound from the delivery of the writ by the *statute of frauds*, in the case of a common person ; although in the case of the crown it remains as at common law : the sheriff must gain a property till execution of the whole ; which cannot be till sale of the goods, and payment of the money to the plaintiff, till when this special property continues ; and the sale, though after the expiration of the return, was good. And the common course of proceeding shews this ; the sheriff not being bound to make a return of the writ of execution, unless the party requires it.

But as to the point of equity I have more doubt : it is under very extraordinary circumstances. Who are *Cole's* under-tenants ? The expression is so general, I do not know what to make of it ; for if *cestuy qui trust* continues in possession, the law says, he is tenant at will to his own trustee. This being a transaction between persons *conjunct*, as the *Scotch* law calls it, looks a little unfair ; and I will direct an inquiry by the *Master* into the fairness of it.

WYTH v. BLACKMAN, Feb. 7, 1748-9.

(Reg. Lib. 1748. B. fol. 495.)

S. C. Amb. 555—Deed, construction of—Grand-children and great grand-children included by the term "*issue* : " and the word "*children*" following it, explained as meaning "*issue*" likewise.

Furniture, &c. at *H.* bequeathed for the use of those who should enjoy the estate, to be taken care of and delivered to executors, and to remain at *H.* as if in his own possession ; vests in the first tenant for life.

The trust of a real estate may be claimed by those who have right as real, and a conveyance demanded accordingly.

Instead of declaration of trust to provide for the several stocks and at distance of time children extended to *issue* in general.

To give right of representation no occasion for vesting in the ancestor.

Taking *per Capita* and *per Stirpes* at same time.

Devise that house-hold-stuff at *H.* should remain there for use of those who should enjoy the estate by a settlement, to be taken care of and delivered by executor, &c.

They go to the representative of the first taker, who was tenant for life, and were not to be sold as heir-looms with the house, although no tenant in tail vested.

COLONEL JOHN THURSTON in 1695, made a voluntary settlement, and limiting the real estate to himself for life, without impeachment of waste ;

remainders to trustees for five hundred years, to raise money for payment of his debts, remainder to his nephew *John* for life; remainder to trustees to preserve contingent remainders; remainder to the first and every other son of *John* in tail male, remainder over in default of such heirs male to four persons, (three of whom were his sisters, and the fourth a daughter of a deceased brother) and their heirs, in trust that they or the survivor, or heir of such survivor, shall or may sell the premises, as soon as convenient: and that the money raised thereby, together with the mesne profits, may be equally divided between them (naming them particularly) or the respective issues of their bodies, in case they, or any of them, shall happen to be dead at the time of such failure of issue male of *John*, share and share alike, viz. to each of them, or their respective children, one-fourth part thereof: provided that if any of them shall happen to be dead without issue, when there should be such a failure of issue of *John*, then to be equally divided among the survivors or their respective children, in case any of them also shall be dead, leaving issue of their bodies.

In 1697 he made a will, first reciting shortly the settlement; then that all his household-stuff at *H.* at his death should remain and continue there for the use of such person or persons, as should enjoy the estate by the aforesaid settlement, to be delivered to him or them by his executor, when the person, who was to enjoy them, was capable of giving a discharge: in the mean time his executor to take care of them, but not to be chargeable for loss, but that the same should remain there, as in his own possession if he was living.

After his death his nephew *John*, the next tenant for life (then but eight years old) enjoyed the estate, which came into possession upon the debts being paid off, till 1744, when he died without issue: at whose death none of the four persons were living; the niece having died without issue: but of the three sisters, by Lady *Chancey* there were children then living; by Mrs. *Wyth*, children and great grand-children: by Mrs. *Blackman*, there were only grand-children, and no children then living.

The bill was brought by the surviving children of Lady *Chancey* and Mrs. *Wyth*, to have the whole divided into moieties: in exclusion of the grand-children of Mrs. *Blackman* and of the great grand-children of Mrs. *Wyth*.

For plaintiffs: *Issue* in a deed is a proper word of purchase, descriptive of particular persons: which is the primary sense of it: although in wills, *ut res magis valeat*, it has been construed a word of limitation. Although the court has gone so far as to construe an elder to be a younger child by its liberal exposition of the trust of a term created for a provision for children in marriage-settlements; yet not in other cases. It was held so by his Lordship in *December*, 1742 (1); but the construction contended for goes farther than is allowed even in wills, 2 *Vern.* 107, where it was refused to construe it to children's children. This settlement is particularly descriptive of the persons: and the bounds prescribed beyond which it ought not to go. There is no such necessity here as in *Wild's* case; and there is the less necessity for construing this to so remote a degree, as the donor had none other but those four persons in view; who might probably be all living at the time of the sale; if *John*, who was [198] then very young, died soon without issue. The viz. alters and limits the sense of the word *issue*; and denotes both the shares and per-

(1) *Heneage v. Hunkle*, 2 Atk. 456.

sons to take: and where the trust or beneficial interest is more extensive than the legal interest, the court will make the legal as extensive.

Against this was cited *Wild's* case; and that the word *children* often means remote children, appears from that very case in 2 *Vern.* 106. The *viz.* was not to explain what *issue* meant, or the persons who were to take, but only the particular shares; the *proviso* meant a general failure of issue; taking in all the descendants: and by the other construction an accident might happen, which could not be designed, of resulting to the heir at law.

A second question was made as to the furniture and household-stuff; that there was not such an absolute interest vested in *John* as to be transmissible to his representative: and although if the contingency of *John's* having a son had happened, the limitation would not have taken effect, because too remote: yet the contingent estate tail, never having vested, is out of the case, and the limitation over good: [2 *Vern.* 600. *Salk.* 156. 2 *P. Wms.* 694. 886.] according to *Higgins v. Downes*, and *Stanley v. Lee*, and they shall go as heir-looms with the several limitations of the real estate.

For the representative of John: This household-stuff was delivered by the executor to *John* according to the directions; most of which he had sold and removed. The doctrine contended for was exploded in *Clare v. Clare* (1), [Cas. Talb. 21.] Lord *Talbot* saying, that subsequent accident could not make good the limitation: and the cases cited are there considered, as not supporting that doctrine. In *Levison Gower v. Grostenor* (2), the party had himself pointed out the double contingency, of having no son, or if having, he should die before twenty-one. The clause there was, that the plate, jewels, &c. should go as heir looms, as far as by law they might, to the heirs-male of the family successively, as the real estate went by the settlement. But your *Lordship* declared you did not give your opinion upon that principle; but on this, that there was no clause here that they should go as heir-looms; or, if so intended, it was while the estate remained in the family: nor for those for whom it was sold.

LORD CHANCELLOR.

I fear, both the bill and the defence are founded on a wrong principle: that this is mere money, and personal estate: but I do not take it so; but that it is real estate: and so in equity, because the rents and profits till sale are to go in the same manner, which is the trust of a real estate, according to which all the persons might have come into this court, and prayed a conveyance of this estate; which could not have been opposed; and is the ground of the determination in the *House of Lords* in *Roper v. Ratcliff*, (3), *viz.* that the surplus of the estate sold being real, whoever had a right to the trust might have brought a bill claiming it as a real estate without opposition; which was an instance more liable to objection than this: the estate being there devised for payment of debts; and the question was only as to the surplus, whether it should in equity

(1) That case is considered as over-ruled; and particularly by *Sabbarton v. Sabbarton*, Forr. 244.

(2) Barn. Ch. 54.

(3) 5 Bro. P. C. 60. octavo edit.

be considered as real or personal. It was held to be real, as part of the ancient trust, on this principle, that the owners might have come into the court, taking upon themselves the payment of the debts, and desiring the surplus of the estate to be conveyed to them. Then much more, when the persons interested are made trustees, and the estate given to themselves, might they come and pray a conveyance of the land itself in the same proportions: nor is there any objection against the sisters having the inheritance; for the direction to sell, and give them the whole money, will give it them: and although certainly, where money is agreed to be turned into land for valuable consideration, or the contrary, in equity it will be considered as done; or where any words in a will importing land to be taken as part of the personal estate. But on a bare direction in a will giving real estate in trust to be sold, and the money to be so divided, I do not know the court has ever taken it to be so. I do not give any opinion now, but mention it for your consideration.

But all parties agreeing to have it considered as money;

Lord Chancellor delivered his opinion,

This is a very particular case, and an extraordinary limitation and disposition of a real estate; but the court must make such a construction as appears agreeable to the intent of the donor and creator of this trust. Whatever doubt there may be on this case: whether to be taken as real or personal, (of which I have great doubt) yet as all parties submit to have it considered as personal estate, not of the original donor, but of the respective persons who were to take under him, and as it is for the interest of the defendants the infants to have it so taken; and as it will rather tend to support my opinion, even though any other should take it as real; I will consider it as money.

The first question is, whether these children of two of the sisters are intitled to have the whole of this estate divided into two shares among them? Or whether the grand-children of the other, and the great grand-children are intitled to a share with them? Which will turn principally on the construction of the words *issue* and *children* in this declaration of trusts. Whether *issue* is to be restrained and abridged by *children*; or *children* enlarged and extended by *issue*. [200]

To pave the way for the constructions of this trust, his intention so far as it can be collected, must be considered. And first, it arises clearly, that though he might have in view and expectation, that this trust might be executed at no great distance of time; he had in view also, that it might rise and take effect at a very great distance: by the limitations to the sons of *John* continuing several years, so that there might be no possibility of these sisters being then living; as appears throughout the whole, and should not therefore be confined to a speedy failure of issue-male. His next general intent was clearly, after failure of the issue-male and these remainders taking place, to make a provision not only for the sisters, if living, but for the several stocks and branches out of this trust: if the construction for the defendants prevail, it answers that intent; whereas that for the plaintiffs narrows it to the children of the sisters: and if the failure should happen at the end of one hundred years, when the sisters and all their children are dead, all their descendants would be thereby cut out, and the trust would result to the heir at law; which would certainly be contrary to the intention to provide for their stocks: then consider,

how the words are capable of a construction to answer this intention. If it rested on the word *issue*, there is no doubt; being a description taking in all issues *in infinitum*, (1), although not in notion of law as estates tail, but as purchasers by description: being issue of the body: and there is no difficulty in the thing, the division being very easy and natural among them. The great objection to this is from *videlicet*, that being an explanatory clause, it restrains *issue* to *children*; but that was not the donor's meaning; which was, as is said for the defendants, principally to explain the shares thereby; although he might mean both. A difficulty might have occurred to the drawer, that one might die, leaving three or four children or grand-children, who might be construed to come in *per capita*, to have equal shares of the whole with the surviving sisters: to avoid which doubt he explains, that the issue or children of the deceased should take only the share of the deceased. In *Wild's* case, 6 Co., and in *Bend.* 30, it is settled, that *children* bear a co-extensive sense with *issue*. Then why should not the court take this to be so, if it more fully answers the intention of the donor who created this trust, which might take effect at a distance of time? But the *proviso* is decisive; under which the plaintiffs claim, and must bring themselves within the contingency put there: which not having happened, as Mrs. *Blackman* leaving grand-children living, did not die without issue, it cannot be divided into two shares only; for the death of the niece without issue will only warrant a division [201] into thirds: and the donor understood, when a person is dead without issue: for by the failure of issue male of *John* he meant failure of descendants of his body generally, not of sons and children only, and has used the words in the same sense. Here *issue* and *children* are again used in a general collective sense *in infinitum* (u). According to the authorities, grand-children, and great grand-children, are all children, and come within that to certain purposes: and in 2 *Vern.* 106, it is said in the conclusion, that it is allowed by all, if no children are in being, grand-children would come in under the word *children*, and may be thereby described; which is sufficient for the present purpose. This makes the construction consistent with the donor's intent to provide for the execution of the trust at a distance of time, and for the several stocks, who would be unprovided for, if restrained. An inconvenience is urged from it being to be divided among a great number, splitting the property, which may not be for their advantage, nor according to the donor's meaning. He has made a provision for such right of representation, as the *statute of distribution* allows among collaterals, brothers and sisters children, considering the sisters and niece as collateral among themselves, (as they were) and it has been held brothers and sisters of the intestate: but that objection holds not on the foot of the intent; which lets in the niece and her children; going one degree beyond the right of representation allowed by the *statute*, by which grand-children of brothers or sisters are excluded. But the question here is not of the personal estate of the donor, but of those who were to take under it; and then not to be considered on the foot of a col-

(1) See *Horsepool v. Watson*, 3 Ves. 383.; *Davenport v. Hanbury*, *ibid.* 257.; *Royle v. Hamilton*, 4. Ves. 437.; *Reeves v. Brymer*, *ibid.* 692.; *Radcliff v. Buckley*, 10 Ves. 195.

lateral, but lineal succession, which may go *ad infinitum*; for according to the first clause of the statute, all the stocks are to take, and the representation to go on *pro suo cuique jure* to the great grand-children representing their respective parents; and so not more inconvenient than in cases arising on that statute.

It is objected that nothing vested in the parent by Mrs. Blackman's dying in the life of John, so that her grand children cannot take from her, in whom nothing vested. But to give a right of representation there is no occasion for vesting in the ancestor. Under the statute, nothing vests in the ancestor: for then it is gone. So that the children or grand-children of those dying, take (not by personal descent; which the law allows not) that share their ancestors, if living, would have taken, because nothing vested in the ancestor.

The word *children* therefore must be explained and extended to issue; and if the grand-children prevail, then the great grand-children must be let in. But the question is, whether they should take *per Capita* or *per Stirpes*? But the authority of the settlement has shewn in what manner; *per stirpes* as to the stock, *viz.* that which would have belonged to each sister, if living, to go to their respective issues; [202] but to be divided *per Capita* among themselves; as according to the statute of distribution, in lineal succession. Nor is there any objection or inconvenience from their taking *per Capita* and *per Stirpes* at the same time.

The remaining question, as to the furniture, does not at all depend on the settlement, but on the will. The limitation of the household-stuff, in the manner the plaintiffs contend, would be very extraordinary (x). The intent was, they should be enjoyed by the persons living in the family, but not to be sold as heir-looms with the house for the purchasers of the estate, when turned into money. There is no direction, importing they should go as heir-looms; nor ought the court to make any strained construction for that purpose. The age of twenty-one is the time, the discharge was to be given; the saying *him* or *them* is only inaccuracy, from not knowing who would be the first taker. *Them* being commonly so used when speaking of an uncertain person and not in the plural number. But what determines me in my opinion, is, his referring all to the care of his executor; who surely was not to take care of them in succession. I do not know, that such a limitation over of a personal chattel has been held good, merely because the contingency never happened. *Higgins v. Downes* (1), has been oddly and differently reported; nor do I know what to make of it; and where there is a double contingency, it may be a good limitation in one instance, and not in another. *Gower v. Grosvenor* went on another foundation; the direction being there to go as heir-looms, as far as by rule of law they might: and because the trust might be settled according to the rules of law to one, and if he died before twenty-one remainder to another, that might be good, because such a limitation might be. But I did not determine that point: nor do I now.

(x) Brown, 274. 2. Vol. 121, 277. But in Prec. Chan. it was held, that in such case the goods shall go according to the devise, and not be in the power of the first taker; unless he had an absolute property in the house, as his interest should be the same in both; if tenant for life, he should have only the use of them for life; if tenant in tail, as he then has the absolute property of the estate, he shall have the same in the goods.

The bill must be dismissed ; but the costs of all parties to come out of the estate (2).

(2) It was only dismissed so far as related to the furniture and household stuff.

EARL OF DERBY v. DUKE OF ATHOL, Feb. 8. 1748-9.

(Reg. Lib. 1748. B. fol. 236.)

On a plea to the jurisdiction it must be shewn *what other court has jurisdiction* (3).
A question concerning the right and title to the *Isle of Man* may be determined.

THE bill was to have a discovery concerning the general title of the *Isle of Man*, and to have relief on a particular point of equity relating to the rectories and tithes within that island ; which equity was, that in 1667, Lord *Derby* granted the rectories and tithes to the bishops and clergy there, for the enjoyment thereof gave some lands in *England* as a collateral security. To introduce this equity the bill charged, that although it was pretended, that the bishop and clergy were evicted, yet it was by collusion between the defendant and them in order [203] to affect the collateral security : and that the defendant made them an allowance in the mean time equivalent to the profits.

To have a discovery therefore of this matter, and relief against this attempt to charge the collateral security, was the bill brought, and not being damified with respect to the enjoyment of the tithes, &c. or if damified, it was by their own default.

The defendant pleaded in general to the jurisdiction of the court : that the *Isle of Man* was an ancient kingdom, not part of the realm, though belonging to the crown of *Great Britain* ; and that no lands, &c. there, ought to be tried or examined into here : demanding judgment whether he should be put to answer further.

LORD CHANCELLOR.

This comes to be of great consequence to all the courts in *England*. There are two general questions on this plea : first, whether the plea is good in point of form ; not a trifling form, for if the objection thereto on the part of the plaintiff be right, it is material to the nature of such plea ? Secondly, whether good in substance ?

As to the first, it is objected for the plaintiff, that although it is shewn in the negative and alleged, that this court has no jurisdiction over the *Isle of Man*, and it is not to be tried here : yet it is not shewn in the affirmative what other court has jurisdiction, or that there are any courts in the *Isle of Man* holding plea thereof : and the rule is insisted on, that whoever pleads to the jurisdiction of one of the King's superior courts of general jurisdiction, must shew (y), what other court has jurisdiction. I am of that opinion : and that for the want thereof the plea is bad, and ought not

(y) 1 Vern. 59. And may demand judgment of the court, whether he shall be compelled to answer the bill. Chan. Pleas, 80. Plea to the jurisdiction of a general court, must shew where the jurisdiction vests, as well as negatively, that it is not these ; *secus* of inferior courts. 2 Vol. 375.

(3) See also 1 Ves. jun. 372, &c. The close analogy between pleas at common law and in equity is peculiarly observable in the above instance, See Mr. *Beams'* excellent *Treatise on Pleas in Equity*, 89, 90 &c.

to be allowed, if nothing more is in the case; as it is expressly laid down in 2 *H. 7.* 17, *a.* and *Doctrina placitandi*, 234; and agreeable to the general rule of pleas of this sort, as in the pleas of abatement, wherein it must be shewn, the plaintiff may have a better writ. The reason of this is, that in suing for his right, a person is not to be sent every where to look for a jurisdiction, but must be told, what other court has jurisdiction; or what other writ is proper for him: and this is a matter, of which the court, where the action is brought, is to judge. There are not many authorities on this head, but in the old books of *entries* the form of pleading is so: and the opinion of *Popham*, C. J. in *Yel.* 13, and *Fitz. Ab. Tit. Jurisdiction*, concerning *Wales*; and although Lord *Vaughan* may have denied that to be law: he was a very strong *Welshman*, as appears throughout his argument; in which, though there is a great deal of good and useful learning, yet it never was desired, though intended to be so. It is said to this, that the court ought in this case to take notice of [204] what is the jurisdiction: that the matter of fact is shewn; and is it likened to the case of inferior courts; wherein it is sufficient for the defendant to plead, that the cause of action arose out of the jurisdiction of that court: but I cannot put this (which is a superior court of general jurisdiction, in whose favour the presumption will be, that nothing shall be intended to be out of its jurisdiction, which it not shewn and alleged to be so) upon a level with an inferior court of limited and local jurisdiction; within whose jurisdiction nothing shall be intended to be, which is not alleged to be so. 1 *San.* 74. I was desirous to be informed, how the pleas were in this court, which are looser than at law (1); and no case has been cited, in which the plea to the jurisdiction of this court has not given jurisdiction to another, as to a visitor, &c. *Attorney General v. Talbot*, March 21, 1747, and *Strode v. Little*, 1 *Vern.* 58, [Ante, 78, et vide Post, 162]. But the case in 2 *Vern.* 494. of the *Isle of Sarke* is very material, and comes nearest to the present case; where another jurisdiction, where justice might be had, as being parcel of *Guernsey*, was shewn. The plea therefore is not to be supported on this point (2).

But secondly, to consider it on the merits and substance; the general averment, that no land, rectory, &c. there is examinable in this court, is not true or well founded, but laid down much too large: because upon an equitable right to this island, and both parties resident within the jurisdiction of this court (a), it might be determined here. The question here is, to the right and title to the whole island, which cannot be determined in the courts of *Man*; because that would be permitting the persons, who claim the seigniority of the *Isle*, to judge in their own case: then there must be some court or other here to determine that right; either this court or the *King's Bench*, or the *King in council*. Cases may be put, in which this court and the *King's Bench* both have jurisdiction concerning the right to the *Isle*. As upon a *scire facias* to repeal letters patent granted of this whole *Isle*; it comes to this then, that here is a question concerning the

(a) 2 *Vent.* 362.

(a) But the law of *England* do not extend to it, unless expressly named, 2 *Vol.* 550.

(1) See some of the reasons of this variance, ably treated by Mr. *Beames*, in his *Work on Pleas in Equity*, 3, 4, &c.

title of this whole *Isle* brought in judgment by this bill; but it is a question of law, not of equity, and therefore this amounts only to a plea for want of equity; for if some court here must determine it, the question is, which? and if it was a question of equity, it would certainly be this court, although it was of a matter out of its jurisdiction: as in the case of the *Isle of Sarke*. So that upon a mortgage made of this *Isle*, and both mortgagor and mortgagee resident within the jurisdiction of this court, upon a bill concerning it, the court would hold jurisdiction of it (b); for [205] a court of equity *agit in personam*; and then I will never suffer a plea for want of jurisdiction in the court.

But there is another point, as to the rectory and tithes, which is mere matter of equity as stated in the bill: the relief prayed against the collateral securities being burthened by this collusive damnification; and if it be so, the plaintiff may have a very proper case; but whether it is so stated, as to be sufficient to intitle to relief, is not necessary to determine on a plea to the jurisdiction. But supposing all this out of the case, in respect of the discovery, there is no colour to plead to the jurisdiction. The *Isle of Man* is subject to some court in *England*; then the plaintiff may come here for aid to discover his title; for he may bring a general bill for discovery, without setting out his title; and upon a plea to the discovery and relief both, it may be allowed as to one, and over-ruled as to the other. Then supposing the jurisdiction to be in the *King in council* (although I do not know that it has been shewn to be so) a bill may be brought for a discovery of such title, and the court ought to give that discovery; because the *King in council* cannot do it, nor compel the defendant to answer upon oath: although in some cases the court will not lend its aid to a discovery: as not to aid the jurisdiction of an inferior court; and I have heard it said, not of an *Ecclesiastical* court (1). The true reason is, that it is not wanted there; for they may compel an answer. But I will not hold the jurisdiction of the *King in council* to be of such a nature as to be below the being aided by this court to give relief to come at that discovery; as it must be determined in some court, the plaintiff is intitled to come here to have that discovery. Supposing then the objection for want of form out of the case, I must have over-ruled it as to the whole discovery, because it was a proper matter for relief; the question then comes to this; whether ever the court divided a plea to the jurisdiction? Of late indeed upon a bill for several matters of discovery and relief, if there be a plea to the whole bill, which is a proper bar to part (c), the court divides it, and lets it stand good as to part; * although upon demurrer (3) the court over-rules it (d) wholly: but no instance, that where a plea covered too much, the court ever divided it.

(b) 4 Inst. 331. Post, 447, 454.

(c) 1 Atk. 53. 2 Vol. 108. 3 Atk. 70. Mos. 40.

* Though there cannot be two demurrers to the same bill, yet there may be one to the original, and another to the amended bill. 2 Brown, 66.

(d) There is no saving any thing on a demurrer. 2 Vol. 110.

(2) See *Beames on Pleas in Equity*, 253, and note, and *ibid.* 65.

(3) See 2 Bro. P. C. 514. 516. and 18 Ves. 472.

KEMP v. SQUIRE, February 10, 1748-9.

(Reg. Lib. 1748. A. fol. 193.)

S. C. 1 Dick. 131.—Inrolment of decree set aside under circumstances (1). Not, however, if made upon the merits (2).

The House of Lords judge by the same rules as inferior courts of equity.

THE plaintiff (c) continued an infant from the beginning of the suit till within six weeks of the pronouncing the decree; and petitioned to have the enrolment of that decree set aside, because of the great neglect of the solicitor employed by him.

Lord Chancellor doubted, whether it was in the power of the court to open this enrolment on any terms; for if it was, he was of opinion the court ought to do it on the circumstances of the case; and desired precedents might be searched.

Two were now procured: the one *Robson v. Cranwel* (3), December 8, 1731, before Lord King; where a bill was brought by a person of full age, who left money with his solicitor to fee counsel, and [206] went beyond sea. A *Subpœna* was served to hear judgment; but the solicitor not employing counsel, the bill was dismissed with costs. It was held a bare dismissal by default; and the court, upon the plaintiff's paying costs, opened the inrolment, and set aside the order; giving the plaintiff leave to make out the merits, and apply to rehear.

The other was *Benson v. Vernon* (4), November 1745, in the House of Lords, where the plaintiff filed a bill in the court of Exchequer in Ireland, to foreclose the equity of redemption of an estate. Captain Vernon brought a cross bill to impeach the mortgage for fraud; and served Benson in England with process to answer, and a commission prayed to take his answer in England; upon Benson's taking no notice of what passed in Ireland, it was ordered, that the cross bill should be taken *pro confesso*; and the original dismissed. An answer was afterward put in by Benson, and application made to the court to reverse that order, and to set aside the proceedings as irregular; which were reported by the remembrancer to be regular, and confirmed; and the application was to set it aside on another ground; of his having been in a bad state of mind. But the court of Exchequer thought it out of its power to deprive the party of the benefit of that inrolment, which was obtained regularly. Upon appeal to the Lords in England, as the merits of the case had not been entered into, they ordered the inrolment to be set aside, notwithstanding the proceedings were strictly regular; and that on payment of costs the decree should be opened, and opportunity given to bring on the cause in a proper manner.

(c) Post, 245. Proc. Chan. 134. 2 Ch. Rep. 128. 2 Vern. 409. 2 P. Wms. 73. 3 P. Wms. 111, 371.

(1) Vide also post, 326, which is S. C. with 409. and *Pickett v. Loggan*, 5 Ves. 702.

(2) Vide *Charman v. Charman*, 16 Ves. 114.

(3) 1 Dick. 62.

(4) 3 Bro. C. P. 626 oct. edit.

LORD CHANCELLOR.

No irregularity or misbehaviour in the defendant will induce the court to set aside this inrolment; but any court of justice will incline, as far as in its power, to open what is concluded that the merits may come before the court, and that the plaintiff may not be precluded from entering therein, and having justice done. Had the plaintiff been so fortunate as to continue an infant till after the hearing the cause, he certainly would not be bound by this: but he might, when of age, have brought a new bill, by shewing his case not to have been properly taken care of; and his case is very near to that. Compare this to the proceedings at common law; when a judgment is signed by default for want of a plea, or any other default, although the plaintiff in the cause is strictly regular, yet will the court set aside that judgment; though they will vary the circumstances and terms on the defendant according to the case. But if the party immediately on signing the judgment would enter it up on record, the court would hold it more out of its power to set it aside. Then a decree is [207] of equal validity; the plaintiff's being under age in this cause till so near the time of hearing is as strong an excuse, as the plaintiff going beyond sea pending the suit was in the first precedent.

As to the second: it is objected, that *Benson* was considered by the *Lords* as a lunatic; who by all laws is protected, and impliedly excepted; but the *Lords* did not consider him as a lunatic strictly; for it appeared, he did business in the mean time: and though farther objected, that the court of *Exchequer* in *Ireland* could not do it; but that it required a superior court, the *House of Lords*. I am unwilling to give into that notion; for a court holding plea by error or appeal is to judge by the same rules as the inferior court from whence it comes; the rules of law and equity being the same here as in the *House of Lords*.

Both these precedents therefore prove it to be discretionary in the court, (I do not mean arbitrarily so) to exercise this power, if they see fit (1): and there are sufficient circumstances in this case to induce the court to do it: but on payment of the costs of the day, &c.

Let the inrolment be discharged, and the plaintiff be at liberty to apply for rehearing.

(1) See *Anon.* post, 326. which is S. C. with *Wright v. Wright*, post, 409.

MEDLICOT v. BOWES, Feb. 22, 1748-9.

(Reg. Lib. 1748. B. fol. 209.)

Testator "desires" J. "to leave" D. £500, at her death, out of the money bequeathed her; held to amount to a legacy from the original testator; and not to lapse by D.'s death in J.'s life-time. he having survived the testator.

No set-off allowed where the demand is in *auter droit*.

DOCTOR BOWES by his codicil desired his sister *Jane*, out of the money given her by his will, to leave £500 at her death to her nephew *Dawson*, who survived the testator, who died before *Jane*.

This bill was brought by his representatives against the representative of *Jane* for this legacy out of the personal assets of *Doctor Bowes*.

For Defendant: (f) It is admitted, that if a legacy is given payable at a future time, as when a stranger attains twenty-one, before which the legatee dies, it shall go to his representative: which, though doubted of by Lord Comper, is now settled. But the question is whether this is so vested, that the legatee shall have it in all events, though he did not survive Jane: and whether from the word *leave* it shall not partake of a legacy by Jane, and therefore lapse?

It was further insisted, that an account between Dawson and Jane in Jane's should be allowed by way of *set-off*.

[208]

LORD CHANCELLOR.

The first point is very clear. *Desire*, expressing the will of the testator, amounts to a legacy, and the word *leave* makes no difference; to leave or pay at her death being the same. Suppose Dawson had survived Jane, who had not left it to him, he would be intitled to it from the original testator, not from Jane: and then his dying in her life makes no difference; for it has been often determined, that if there be a legacy out of personal estate payable on contingency, notwithstanding the death of the legatee before the contingency, it is still a clear demand.

As to the second point; this is a demand in *auter droit* out of the estate of Doctor Bowes: and the court will not mix demands, by allowing an unliquidated account between Dawson and Jane, by way of *set-off*; which the court would not suffer before the acts of parliament allowing *set-off*; nor do those acts extend to it; not allowing a *set off*, when the demand is in *auter droit*. So that if an action at law is brought against an executor, for a demand due from the testator, he cannot *set-off* against that a debt due from the plaintiff to him.

(f) Legacy given to the children of D. after the decease of annuitant, in whose life six children died, the legacy was vested and a child born after the death of testatrix, but in the life-time of annuitant, was let in to take. 1 Bro. 386, 481. and 3 Ves. 308, note.

EMPEROR v. ROLFE, February 1748-9.

(Reg. Lib. 1748. A. fol. 693.)

Portions in a settlement by a term after mother's death for defendants, to grow due and payable at twenty-one or marriage, &c. one daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to her representatives, and not to her sister.

IN a settlement a sum of money was provided by a term after the mother's death for daughters portions, to grow due and payable at twenty-one or marriage: and if any of them should die, before their portions became due and payable, it should go to the surviving daughters, with directions to the trustees for maintenance, till the sum grew due and payable.

There were two daughters: both attained twenty-one, and married: but one of them dying in life of the mother, the other claimed the whole sum by survivorship against the children and representatives of the deceased daughter, as not being a vested interest till the mother's death.

LORD CHANCELLOR.

This is a very harsh demand: that a child living till twenty-one, marriage, and that with consent, having children, and all in dependance upon that portion should by dying in the life of her mother absolutely lose it; which could never be in the intent. Those times of payment were inserted to declare, that it should then become payable (1), and not to be raised or burthen the estate before, if the child did survive the mother.

[209] This is not a question of raising it to the prejudice of the estate; but whether, after it has come into possession, it should sink into the estate; for which there is no colour; because the parties having declared in what contingency the term shall cease, the court will not carry it further, and say it shall cease on any other. Then it must be in trustees for the benefit of somebody: and the question is, for whom? It never could be intended, that by the death of one daughter in the life of the mother, that branch should have nothing out of the estate. Then on the construction of the words *due and payable*, as well as on the nature and reason of the thing, and also from their use in other parts of the clause, they must be relative to the times before fixed, twenty-one or marriage: though indeed it cannot be raised till after the term come into possession: but that is not for the benefit of the one or the other daughter: but of the remainder-man.

(1) See *Willis v. Willis*, 3 Ves. 51. 54. *Hope v. Lord Clifden*, 6 Ves. 499. *Powis v. Burdett*, 9 Ves. 428. *King v. Hake*, Ibid. 438. *Schenck v. Leigh*, Ibid. 300.

COLEMAN v. SEYMOUR, February 24, 1748-9.

(Reg. Lib. 1748. A. fol. 432. entered as *Coleman v. Coleman*.)

Bequest of £3000 to *Jane*, the wife of C. for the use of her younger children, to be distributed as she should appoint; in default, equally. All *Jane's* children by C. being born at the time of the will and death of testator, it was held vested as a present legacy to them, subject to variation *as between them*; but not to extend to her children by a future marriage. The period of vesting being as above, one who was a younger child at the testator's death, and became an elder afterwards, was held intitled. Interest on legacies from the end of one year from the death of testator; except as between parent and child. In the principal case, the legacies being vested, the interest allowed for maintenance, equally subject to the mother's reasonable variation (1).

Where an elder child is considered as a younger.

Interest of a legacy from one year only after testator's death, unless by a father to a child.

Where interest of legacy should not accumulate. Mother having power of appointment, cannot give an illusory share to one.

A MAN devised to his daughter *Jane*, wife of *Coleman*, £3000 for the use of her younger children, to be by her distributed among them in such manner, shares, and proportions, as she shall think fit: and if no appointment was made by her, then equally to be divided among her younger children: and to survive, if any of the children died under age or unmarried.

The first question was, whether the legacy should be for those younger

(1) Vide *antea*, 57, 59.

children only, which she had at that time by that husband; or whether the younger children by any future husband should also take.

It was argued, that though there was some variety of opinions, whether *children* should extend to those born after the making the will: yet never whether to those born after the death of the testator: unless there are future words, when from necessity the testator must have had future children in view. In general children unborn are not presumed to be meant: unless indeed the wife had no younger children at the time; but in the present case she had.

Against this it was said, the legacy was to all the younger children in general. There are three periods of time, on which these questions turn; children at the time of making the will, or the death of the testator, or at a particular time when the money should be paid to them; as was determined by his *Lordship* in a late case [*Ellison v. Airey*, Ante, 111.] when a middle way was taken, that the testator meant, it should be confined to those who were born at the death of the person, who had it during life, and that it should neither extend to those to be born at any time, or confined to those born at the making. But the general argument, upon which the court has gone to confine it to any particular [210] period, is taken away here, by the testator's having in view a possibility of the distribution, waiting till death of the mother, who may still suspend the appointment. Nor is it natural by such a general description to have in view the providing for those then born.

Another question was between the children then living: whether *Edward*, who at the testator's death, was a younger child, but since became the elder, should still be held a younger: for that, unless the mother should appoint, it should wait till her death, what younger children should take; at which time he was the elder.

LORD CHANCELLOR.

There is little doubt: although the intention of the testator is not very clear. There have been different determinations of these sort of cases: whether *children* or *younger children* should relate to those born at the making the will or after the will; or further in life of the person whose power it was committed for life (1), and no general rule has been laid down, but always construed according to the particular words, the circumstances, and view of the testator. I am delivered from any difficulty, which would have arisen, had there been any children by *Coleman* born subsequent to the making; for they were all born then.

As to *Edward*, he was a younger child at making the will, and death of the testator: and must be considered as a younger child, notwithstanding the accident that has happened since the death of the elder: and there are several instances, in which a child, who was then a younger, has been intitled both to the portion of younger child and a settled estate also.

As to any children that may be born of a second marriage: they could not be intended; for she having four children by *Coleman* at the making the will, if after his death she married a second husband, having a great estate settled on the elder son of that marriage, that son within the de-

(1) See *Hill v. Chapman*, 1 Ves. jun. 405, and 3 Bro. 390.

scription of a younger child would have been contrary to the intent. But the words could not take in the children born subsequent to the making or death of the testator; being a present legacy. It might be different, had he given it to her for life, and afterward to her younger children; because then it would be contingent, and a devise over: but here it is in present; and the same as if he had said, equally to be divided unless she appoints; being a vested interest and immediate gift to them, [211] subject to the power of variation given to the mother (2). Nor does the clause of survivorship make any difference, being still vested: this legacy then both in the intent and words is present to them, and not to be extended to those born after his death; and it can only mean children living at the making of the will, or at farthest at the death of the testator.

As to the interest; it cannot be given earlier than from one year after the death of the testator: * which has not been carried further than in case of a father giving a legacy to a child; but this being a present legacy and vested (h), the interest shall not accumulate, but go in mean time among those intitled to the principal for maintenance, till the mother executes the appointment: which she may still do in a reasonable proportion so † as not to give an illusory share to one; which the court would correct, as different from the intention.

* 2 Brown, 58.

(h) Trustees to apply interest for childrens maintenance till twenty-one, and on their attaining their ages of twenty-one, equal shares of the principal to be transferred to them; the interest accrued between the elder and younger children coming of age, decreed to be divided between them. 1 Brown, 335.

† Unless there is great misbehaviour. Ante, 59.

(2) See 2 Ves. jun. 698. *Smith v. Lord Camelford*.

MARTIN v. MARTIN, February, 1748-9.

Injunction against creditors suing at law after a decree to account (1).

The court aims at equality of satisfaction in administration of assets.

In what respects the proceedings against heir for debt of ancestor agrees with or differs from the proceedings against executor or administrator. Post, 282. *Johnson v. Mills*.

ACTIONS at law were brought by several bond-creditors against an heir at law, who was also devisee. A bill in this court was also brought against the heir at law by other bond-creditors, on behalf of themselves and the other creditors, to have satisfaction out of the real and personal assets: a decree obtained by them; an account of the debts directed, and a sale of the real assets descended, in order to a satisfaction of these demands.

The heir at law brought a bill to have an injunction to restrain those bond-creditors, who sued at law; for that after a decree for a sale, there was no instance of creditors being allowed to proceed at law to affect that estate, when the fund itself, by which satisfaction was to be made to the creditors, was taken from the heir at law, who was brought before the court in respect of his title only, not his person.

On the other hand it was said, that the sense of the court always was,

(1) See *Gilpin v. Lady Southampton*, 18 Ves. 469.

that it was out of its power to take away any remedy from a creditor; to prevent the mischievous consequences of one creditor's chalking out a method, by which the rest must proceed: for then it would be easy for the heir at law to single out one creditor, and get him to bring a bill against him for that effect.

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LORD CHANCELLOR.

The justice of the case is very clear. It must be considered, what is the rule of proceeding in this court and at law against the heir. To clear the way it is necessary to consider, in what respect the case of an heir at law, charged for a debt of his ancestor by specialty, is like the case of proceeding against an executor or administrator: and in what they differ. In both cases the court aims at equality of satisfaction as far as possible. In the present constitution of the law of *England*, both in this court and courts of common law, there is some confusion and inconvenience in respect of the administration of assets both real and personal: and therefore it has been desired, that a new provision should be made by the legislature concerning it. A direction was given to the judges, that a bill should be brought in as to the personal assets: and a short bill was brought in upon the case of *Morrice v. The Bank of England*, {*Cas. Talb.* 217.} (2), but laid aside from the difficulty, and the time: but that equality, as far as it can be brought within the rules of law and equity, is what is aimed at.

To consider in what respect they differ. In respect of the nature and ground of the charge against each; which, as to the executor or administrator, is not quite as standing in the place of the testator or intestate, but in respect of the estate come into their hands; and therefore the charge is in the *detinet* only, not the *debet*. In an action against the heir at law for a debt of his ancestor upon specialty, the ground of the charge is, that he is bound as well as the ancestor; and therefore it is in the *debet* and *detinet*, as it would have been against the ancestor: and the law gives him liberty to discharge himself by pleading *nothing by descent*, or *but so much*; which plea if found false, he is charged as a person bound for the whole debt, if he had but one acre: which is not the case of an executor, who is charged only for so much as comes to his hands, notwithstanding such plea found false.

Then to consider in what respect they are like. In actions at law against executor or administrator by several creditors, he may confess judgment to which he pleases, though to one who brought his action subsequent to the rest, and may plead that judgment against the others, and that he hath nothing farther, and so discharge himself. Then where one creditor sues at law, and another by bill in equity, the executor has then no remedy, though a decree is obtained here: for he cannot plead that decree at law: because the courts at law do not give allowance to it. So that though the decree is obtained here first, yet the creditor at law may proceed against him, and take the assets out of his [213] hands; and the executor has no other remedy than to bring a bill here setting forth that decree, and to obtain an injunction against that other creditor to support the decree of this court, and to prevent a

(2) Also 3 P. W. 432. note 2. Bro. P. C. 465. octavo edit. in which last it was remarkably well reported.

double charge; during the course of these two causes, the executor cannot bring a bill for an injunction; as the court cannot tell which will obtain judgment first; for if the creditor suing at law does, he must be first satisfied, as he will then gain a preference in course of administration both in law and equity. But if the decree is first obtained, the court will then restrain; which was the ground of the case of *Morrice v. Bank of England*; for had not the creditor, who sued in this court, obtained a decree first, and the *quantum* of the demand been thereby ascertained, the court would not have interposed by injunction against the other creditors as it did; which was affirmed by the *Lords*, an injunction being the only method by which the court can establish its decrees. So if several creditors proceed in this court for satisfaction by different bills; the court will not stop the suit of one, because of the pendency and priority, which may be gained; although this creates an entanglement and difficulty upon the estate. Accordingly in such a case of five different bills against an executor who was ready to administer the assets, and applied to the court to have them all heard together; for that purpose Sir *Joseph Jekyl*, who was willing to attain that equality, postponed the causes, which order, upon motion to Lord *King*, was discharged; for that before a decree obtained, the proceedings in law or equity could not be stopped, or the chance prevented of gaining a priority in point of payment in the administration of assets; but he did not doubt the granting an injunction, if a decree was obtained; because the executor could not plead it at law; which is the case here.

Then consider, how it stands as to the heir at law; have is also devise in the will; but that makes no difference: for a devise to the heir at law is considered as land descended in this court; and does not want the aid of the *Statute of Frauds*. It is said, that during the course of the cause the heir at law applied for an injunction, which was dissolved; and therefore it would be inconsistent in the court to grant one now. But there is no inconsistency, upon the principle of comparing it to the case of an executor or administrator; because it was during the course of the causes, when there was no ground to grant an injunction; as the judgment at law might be obtained before the decree here, and thereby gain a preference. But now the court is to support its own jurisdiction, and give the benefit of the decree, which is obtained, to the creditors intitled to it, and consequently by injunction or order restrain the others from proceeding at law.

Consider it on the common ground of a decree for sale, for satisfaction of a bond-creditor: not only where it is on behalf of himself and others, but even where the bill is for satisfaction of his own particular debt: the constant course of the court being to direct an account of all [214] the bond-debts of the testator or intestate, with liberty to come for a satisfaction; without which no decree for a sale can be; for as they have all a lien against the heir, who is bound as well as the ancestor, they are all intitled to receive satisfaction, and might otherwise sue at law notwithstanding the decree for sale by this court; but it would be very mischievous, should the court suffer another bond-creditor, who has not obtained judgment, after a decree for sale, to proceed against the estate; as the effect of a sale could not be had during the continuance of the *levari* on the judgment; which must be removed in order to a sale. The court cannot by an order issuing out of this

decree compel that creditor, who has got a legal title in his own right, to join in a sale, as it may a trustee; nor need a new bill be brought to compel him, as it may be better done now, and with less expense, when all parties are before the court. I will give an instance, wherein the court would relieve the heir, notwithstanding the bond-creditor had a clear remedy at law. The *statute* has changed the law, not only with regard to lands devised, but lands descended; in an action by a bond-creditor before the statute, if there was an alienation before the *teste* of the original writ, *riens per descent* at the time of the writ purchased was a defence, and then no ground at law to charge with the value; which is altered by the statute. If then the court has decreed a sale, in which the heir has joined, and another bond-creditor brings an action at law to have satisfaction out of it, upon his pleading *rien per descent*, according to that alteration he will be charged with the sum of money, for which the estate sold, he having joined in the conveyance: nor would the common law court take notice that it was done by sale of this court: but upon a bill by the heir at law, he would have an injunction; otherwise it would be a great hardship on him: for after recovery against him for the value of the lands descended, he must take his chance, whether the lands decreed to be sold would sell for so much as he is obliged to pay.

(i) But the chief consideration is the impossibility to have satisfaction, unless the court supports its decrees; the principal of which is, that the court does not take away the priority of a creditor: but only supports its rule (k), that a decree of this court is equal to a judgment at law; and then a preference will be given in priority of time only, as in judgments in the courts at law. It is just therefore to grant an injunction now, and not to put the heir at law to bring a new bill. And the court will take notice, that upon that judgment recovered this equity arises.

(j) 2 Salk. 507. 2 Vern. 89. Prec. Ch. 79.

(k) This must be intended only of the personal estate, a decree acting in *personam*, not in *rem*. 2 P. Wms. 621. Post, 496.

JTHELL v. BEANE, Feb. 28, 1748-9.

[215]

(Reg. Lib. 1748. A. fol. 708.)

S. C. 1 Dick. 132.—Devise of all testator's "real" and personal estate (1), "*subject to debts*" affects copyhold lands unsurrendered, for the benefit of the creditors, *there being no freehold lands*. If there had been, it would have been otherwise. No preference allowed to a creditor who became a mortgagee under the devisee in trust. In marriage settlement, &c. on good valuable consideration, as between the immediate "parties," such consideration will run through all the limitations for the benefit of the remotest persons; even of those in respect of whom the deeds would have been voluntary (2).

Husband on second marriage contracts to pay money in trust for the wife for life, and afterward for the issue of that and a son by a former wife; his creditors can not come upon this against the son as being a voluntary disposition as to him.

A MAN who had a son by a former wife, going to marry a second with a portion of £260, in consideration thereof settles £400 that if she surviv-

(1) Vide *Rose v. Burtlett*, Cro. Car. 292, and *Watkins v. Lea*, 6 Ves. 633, &c. Et vide *Goodwin v. Goodwin*, post, 226, and *Tudor v. Anson*. 2 Ves. 582.

(2) Vide *Stephens v. Trueman*, ante, 73, 74.

ed him or had issue by the marriage, the heirs or executors of the husband should after his death pay £400 to the trustees for the benefit of the wife for her life, and after her death for the issue of her marriage, together with the son by the former wife; which son happened to be the only surviving person; and his father devised all his estate (3) to him, subject to payment of debts.

The bill was brought by the father's creditors against this devisee and heir at law; who admitted, there was no freehold, but only copyhold, lands.

The first question was, whether a defect of surrender should be supplied?

Lord Chancellor was of opinion, it should; to support the intent of passing something: but otherwise had there been freehold lands.

The second question was, supposing they passed whether one of the creditors to whom the son had mortgaged these lands, should retain them by way of security for his own debt, as well for the whole debt as for the money lately advanced?

Lord Chancellor was of opinion, that though the general rule was,* that a purchaser or mortgagee need not see to the application of the money, where no schedule of the debts; yet this rule was never carried so far as to put it in the power of the devisee in trust, or of the heir at law, who in this court is considered as a trustee to favour one creditor; which would be the consequence, if this was allowed. All that the court can do for the mortgagee (who is not bound by the admission, that there are no freehold lands, and may have that inquired into, if he will) is to allow him the principal and interest of the money he advanced to the son: but to his old debt, he cannot be put in a better condition; but must come in *pari passu* with the rest of the creditors. This is not like the case of an executor, who having power to administer the assets, and the legal estate in him, may sell a term; the vendee retain it: and this even to satisfy a debt of his own, as was held in (1) *Nugent v. Nugent*. But that is owing to the legal power of an executor over the assets; upon which the

[216] court will not break in; but never held, that if a devisee in trust mortgaged to a creditor of his own for satisfaction or security of that debt, such mortgagee having notice of the trust should retain the estate against the creditors under that trust: or if he mortgages with notice by way of securing the debts of the testator, it alters not the case; for the estate was a security in the hands of the trustee before, and it only operates to change the course; which the court will not suffer the trustee to do; considering it as a fraud to give the preference to one creditor; which the law has not established, nor will this court allow.

The next question was as to this £400, whether the creditors might come upon the reversionary interest thereof?

* Where land is to be sold generally, purchaser not bound to see to the application of the money, but is a mere stranger; *secus* if any specific sum is to be paid besides to another. 1 *Brown*, 186.

(1) *Atk.* 463, there called *Nugent* and *Giffard*. *Barnard*, 78. 2 *Atk.* 41. 3 *Atk.* 235. 2 *P. Wms.* 148. *Secus* if the purchaser colludes with the executor, 2 *Vern.* 616.

(3) The testator devised "all the residuo of his real and personal estate to the son, "to hold to him, his heirs, executors, &c. for ever, and appointed him sole executor." *R. L.*

As to which *Lord Chancellor* said it was more difficult; but that it would be going much too far to say, that it was subject to the demands of the creditors, and that the son was not intitled to the benefit of it; for it would make a dangerous precedent to families; particularly to the case of wives on a second marriage.

It was insisted on to be voluntary with regard to that son: though not as to the wife and the issue of the second marriage, and was likened to a bond by a father to leave a sum of money at his death, which is a fraud on the custom; and although collaterals have been held within a consideration, yet never where creditors were concerned.

LORD CHANCELLOR.

This is different from the case of a bond by a father; for it is a contract between the husband and the second wife and her friends: and so far like *Osgood v. Stode*: [2 P. Wms. 245.] it being provided in the agreement, that the son by the former wife should come in for a share; which is a bargain, and for valuable consideration; for had it not been for this provision the husband would not agree to let it go so far as £400 (1). This often happens on the marriage of a widow; who contracts on a second marriage, to make a provision out of her own estate, after her death and the death of her second husband, for her children by a former; which may be said to be voluntary; yet is reasonable, prudent, and natural; several of which have been supported in this court, as provisions for the children by the first marriage for valuable consideration. If the husband in such cases dies in life of the wife, who dies indebted: the court would not suffer her creditors to come against the children of the first marriage, for whom she had made this provision, because it was voluntary.

(1) Vide ante, 73, 74, &c.

JACKSON v. JACKSON, March 1, 1748-9.

[217]

(Reg. Lib. 1748. A. fol. 402.)

Construction of will; "and" construed "or." Vested legacy. Bequest of £400 to R. to be paid in a year; and of a further sum of £100 at the death of his mother; the latter held also a vested legacy.

A MAN possessed of a leasehold messuage or tenement devises it "To my wife for so many years of the term, as she shall happen to live; she paying the rents, and keeping it in repair: and after her death, if my son R. shall be living, then to him for so many years of the term as he shall live: but if he should be living at the time of the death of my wife, and shall then or hereafter have any issue male of his body, then all the right, &c. therein to go to R. but if R. should die in life of my wife without leaving issue-male, living my son William, and William should have any issue-male, then to William," and in like manner over to another son. "Item, I give £400 to R. to be paid him at the end of one year next after my death; and the further sum of £100 at the death of his mother:" making his wife executrix and residuary legatee.

R. died in life of the wife, leaving a son [the present plaintiff]: and the

question was, whether this leasehold should belong to *William* by the limitation over; or to the representative of the wife as part of the residue; or to the plaintiff the son of *R.* as representative of his father, or in his own right; it being indifferent, as he was the only child.

LORD CHANCELLOR.

It is difficult to unravel this will, but clear on the face of it that the testator did not intend it should go over to the younger branches, unless *R.* the elder died in the life of the wife without issue-male; and out of this to make a provision for *R.* and his family.

The question is, whether the words used are capable of a construction to answer this intent? (*m*) And with some liberty, which both courts of law and equity have used to attain the intent in incorrect wills, it may be fully answered; which must be by construing *and* (in that clause, if *R.* *should be living at death of my wife, and should then or hereafter, &c.*) as if it had been *or*. The consequence of which would be, that though *R.* was not then living, yet if he left issue-male, he should take the estate absolutely.

It is objected, that by this way of construing it, here is a double contingency; and then that *R.* would have the absolute interest, if he was barely alive at death of the wife: but there is no such inconsistency; for in that case he would have it only for so many years as he should live: but if he had issue-male, then absolutely; and that because the testator [218] has said so; and the plaintiff must take this in right of representative of the father; but still it is a provision for that branch of the family (1).

As to the £100 legacy, it is plainly vested, and the time of payment only postponed; for the former words *to be paid*, must be carried on; as they would plainly be, if turned into any other language.

(*m*) 1 P. Wms. 343. 2 Eq. Ab. 368. 2 Atk. 643. 3 Atk. 390. 2 P. Wms. 346.

(1) The daughter and executrix of the wife having kept possession of the premises after her mother's death, an account was directed as to the rents and profits; but the master was directed not to charge her in such account with any "thing for the rents and profits of the said premises for one quarter of a year after the death of her said mother, that time being proper to be allowed her for removing her mother's goods and effects." R. L.

ATTORNEY GENERAL v. DAY, *March 3, 1748-9.*

(Reg. Lib. 1748. A. fol. 276.)

The court refused to effectuate an order, confirming the master's report, for laying out money in land for a charity, where the nature of a devise, on which it was founded, made an opening to evade the statute of mortmain. In contracts, if a tenant in tail persists in refusing to execute, and dies, the court will not decree the succeeding tenant in tail to perform it; for such a one takes *paramount, per formam doni*. Though specific performance might have been decreed against original parties holding as tenants in common, yet, where an alteration prevented a decree as to one moiety, the court would not direct a performance as to the other; the contract being entire, and an execution of half of it inadequate to the prime subject.

JOHN ELBRIDGE, being likely to die, made a conveyance of a real estate

for benefit of a charity. Ten days afterwards he makes a will; by which he gives £3000, the exact value of that land, to the same charity; and £250 to the same; and gives the estate to Mrs. *Elbridge*, wife of *Thomas Elbridge*, and to Mrs. *Wolner*, as tenants in common.

After his death a bill is brought for a general account, and for direction of the court for the settlement of *John Elbridge's* estate under his will, and a decree for that purpose. The court directed the *Master* to receive a scheme for carrying it into execution; the foundation of part of which was to consider, in what way the money should be laid out, and a perpetual fund be created for maintenance of the charity. The *Master* reported a scheme for laying out £3000 in the purchase of these lands: and the £250 in other lands convenient for building the charity school. The case was set down for the charity, to be heard on the matter reserved: and the court made a decretal order, confirming the *Master's* report; that the scheme should be approved of, and the other matters therein carried into execution; none of all which was opposed, but acquiesced under by *Thomas Eldridge* and his wife, who survived him. After her death the present information was brought on behalf of the charity, together with Mrs. *Hort*, administratrix of the personal estate of Mrs. *Elbridge*, to have this purchase carried into execution by the aid of this court, against the devisee of the heir at law of Mrs. *Elbridge*, and against the infant son of Mr. *Wolner*, who was now dead, having settled the estate on himself in tail.

Two general questions were made: first, whether the parties are intitled to carry this purchase into execution by the aid of a court of equity? Secondly, whether the benefit of carrying it into execution in respect of the purchase money, should go to the plaintiff the administratrix, or to the defendant devisee of the heir at law of Mrs. *Elbridge*?

For defendant: The specific execution of agreements here is not [219] *ex debito justitiæ*, it being discretionary: and therefore if objections arise thereto from circumstances of hardship, though not strictly weighed in law or equity, the court ought not to do it. Such agreements must be final, and no room for repentance: the parties were not bound to this by any act; for then there would be some declaration in writing that the estate should be sold; whereas it rests singly on the non-opposition to these orders. But the whole fate of the *mortmain* act depends on this: as the carrying this into execution is contrary to the express provision, or at least the general intent of the 9 *Geo. 2. c. 36*; since which no lands, or money to be vested in lands, can be given to a charity, or land to be sold and turned into money, because of the possibility of its being kept some time in land; as was determined in *James v. Lord Weymouth* (1). But where an election is given to lay out money in lands of the funds for a charity, it may be decreed to be laid out in that which is not void; as has been determined by your Lordship. By the *proviso* in the act, the legislature meant only, that if the money was actually paid, and the agreement complete, the accident of the parties death should not hurt it; but not to conclude an incomplete agreement, as this is, the money not being paid. Still all the other restrictions will take place in this *proviso*; so that it must be sealed and delivered by deed indented and inrolled, &c. But

suppose all this out of the case, and that at the time of bringing the bill, it was impossible: there are circumstances now rendering it impossible; for by the death of Mr. *Wolner*, one of the tenants in common, with whom the contract for purchase was made, it cannot be carried entirely into execution: therefore it cannot in part. The transaction was joint: they cannot therefore come into equity, singling out a divided moiety. The court cannot in this case make any election for the infant; which is only done where there is an absolute necessity; but if the infant dies under age, there are remainders in tail, who surely are not bound by this agreement.

For plaintiffs: The method of carrying it into execution is, that the contracting party shall be esteemed in nature of a trustee; and then his devise cannot vary the right. The *statute* does not absolutely prohibit any vesting of money in land for a charity. Much has been laid out in mortgages: and yet that would come within the words of the act; as in the statute of *King William 3. of papists*, who cannot take a mortgage (1). There is no such rule, that if a contract cannot be carried into execution *in toto*, it cannot in part: one joint-tenant indeed will not be bound by the contract of the other, the right of the survivor being prior, nor will the court carry it into execution in part: but otherwise of tenants in common, who must sever in every action, and their contracts are two distinct grants; and if one of them is disabled by any subsequent act, it [220] may be executed as to a moiety. This once was money, when the parties themselves were bound: and nothing has since happened by death of *Wolner* to change it.

LORD CHANCELLOR.

This case involves several material points; some of them new: and if there were not some clear and decisive in this case, I should take time to consider of the judgment I am to give.

I will say nothing particular of the second question, being merely consequential to the determination of the first; for there is no case, where the representative of the personal estate is intitled to claim the money, arising by sale of the lands, as personal estate; except where one or other of the contracting parties in the purchase is intitled to carry it into execution in a court of equity: for where the court holds, it ought not to be executed, there is no conversion of real into personal in consideration of the court, upon which that right of the executor depends: for if not effectually converted into money, it must be considered according to its original nature as real; and the heir at law must have the benefit. Whether there is any such conversion, depends on their being an effectual agreement binding on all parties, so as under all the circumstances it ought to be carried into execution upon this general principle of equity; that what is contracted for valuable consideration to be done, will by the court be considered as done; all the consequences arising as if it had been so, and as if a conveyance had been made of the land at the time to the vendee. But if the circumstances are such, that it cannot now, or ought not to be carried into execution, though once it might, these consequences cannot

(1) But the law was afterwards altered by 18 Geo. 3. c. 62.

follow ; for the court must consider it as land, and the money as the party's own, who was to be the purchaser.

The first question depends on two considerations. First, whether all, that passed in the life of *Thomas Elbridge* and his widow, amounts to a binding agreement on those parties for sale of the lands? The second, supposing it so, whether the court ought now to carry it into execution, because of the intervening circumstances.

As to the first, I think it did amount to such an agreement ; and that if *Thomas Elbridge* or his wife were now before the court (n), and no change in *Wolner's* moiety, the court ought to have executed it, notwithstanding the *statute of frauds* ; for though that statute has provided that no agreement for the purchase of lands shall be good, unless signed by the party to be bound thereby, or some person authorised by [221] him : yet on all the questions on that statute in this court, the end and purport of making it has been considered, viz. to prevent frauds and perjuries : so that any agreement, in which there is no danger of either, the court has considered as out of the statute ; upon which there have been many cases : as in a bill by purchaser of lands against the vendor, to carry into execution the agreement, though not in writing, nor so stated by the bill : the vendor puts in an answer admitting the agreement as stated in the bill ; it takes it entirely out of the mischief ; and there being no danger of perjury, the court would decree it. Then if the vendor should die, upon a bill of revivor against his heir, I should not doubt to decree it : although I know no case of it ; the principle going throughout, and equally binding the representatives. Then there are other cases, well known, taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. As where agreements have been carried partly into execution : although a controversy might be afterward between the parties as to the terms, yet if made out satisfactorily to the court, it would be decreed, though variety of evidence might be in the case : in order that one side might not take advantage of the statute to be guilty of fraud, the court would hold his conscience bound thereby. But the present is a judicial sale of the estate which takes it entirely out of the statute : the order of the court was not interlocutory, but made part of the decree ; as it always is on the matter reserved, though made at another day : and it includes as well the carrying the purchase into execution, as the establishment of the charity : amounting to a decree for the conveyance of the estate on one side, and payment of the money on the other : who might be prosecuted for a contempt in not obeying that order. And it is stronger than the common case of purchasers before the *Master*, who are certainly out of the statute : nor should I doubt the carrying into execution against the representative a purchase by a bidder before the *Master* without subscribing, after confirmation of the *Master's* report, that he was the best purchaser : the judgment of the court taking it out of the statute. But even in common cases this question may arise ; as if the authority of an agent, who subscribed for the bidder, not being admitted, cannot be proved. Yet if the *Master's* report could be confirmed, it should be carried into execution, un-

less some fraud: for this is all exclusive of any defence, that may still be set up on the other side.

But the material consideration is the next. Whether, as circumstances now stand, considering the events and alteration of rights thereby, the court ought to carry it into execution? The general rule certainly is, that this is discretionary in the court, but will not hold in the present:

[222] for that is generally in cases, where there may be an election of two remedies, by coming here for a specific performance, or by action at law; whereas here there can be no remedy at law; all arising under the acts of this court, from that order amounting to a decree. So that if this court does not carry it into execution, it cannot be at all; yet whether other remedy or not, if there are strong and material objections against it, the court ought not to do it.

As to the first objection: I cannot say this is strictly contrary to the provision of the 9 Geo. 2. called the *mortmain* act. The first clause of which was intended to relate to gifts or conveyances to a charity by way of donation. And it is plain, that the legislature did not intend absolutely to forbid all kind of purchases of lands for the benefit of a charity; but has put them under some restrictions. The *proviso* was inserted in the *House of Lords*, upon mention of the case of the charity of *Queen Anne's* bounty; which could not otherwise have gone on: as the method of executing it is, that the money arising of that fund is laid out in purchase of real estate for the augmentation of poor vicarages. Another consideration was, that this was not intended to prevent the execution of charities already established; in several of which the funds are vested in trustees with intent to lay out in lands, particularly *Dorset Ratchiff's* charity: but to leave them open, restraining the increase of such donations *in futuro*; that it should not be in the power of any person, or of a court of equity, to direct subsequent gifts of money to a charity to be laid out in land: for if that was their meaning, they might as well have rejected the whole bill; as the consequence would be, that a person might leave £3000 to his executors, who might bring a bill in equity, praying a decree for laying it out in lands: Yet in this very clause, relating to purchases, it might be considered how far they are taken out of the statute. The meaning was, that where such purchases are made, they should not be left precarious in point of time: so that though the party should happen to die within the twelve or six months, yet the person, who paid the money, should not lose his purchase, or be put to risk the recovery of it back, as there might not be assets, or stocks might fall. But then the money must be actually paid; in which case I doubt, whether the other restrictions, exclusive of the limitation in point of time in life of the party, will take place on this *proviso*, and am rather of a different opinion; for sometimes the money is paid on articles before a perfect conveyance; and then it would be sufficiently taken out of the act, notwithstanding the circumstance of deed indented and inrolled, is not complied with; the intention of the act being complied with by the actual payment and conversion made of one kind of estate into another. But in the present case the money has not been paid.

But supposing this doubtful: consider whether it would not be contrary

to the true intent and principles of the act? Had this matter been fully entered into at the making that order, as it is now, I think I should not have made it: but it passed *sub silentio* then; the parties agreeing; and the objections not being laid before the court. There is something in this case, which may lay a great opening to evade the act; although *John Elbridge* might not have intended any such fraud: but if such a precedent were made, it would be followed by a person, who knowing if he died within a year after the conveyance, the act would make it void, gives the exact value thereof in money the same way, and then the one to be laid out in purchase of the other. The testator's intent makes it worse, and creates a reason against it: this though mentioned as a barbarous act, is quite otherwise; far from being a prohibition of charitable foundations, it only restrains this method; leaving the disposition of personal property thereto free. The particular views of the legislature were two: first to prevent the locking up land and real property from being aliened; which is made the title of the act, [9 Geo. 2. c. 36. vide *Durour v. Motteux*, postea, 320.]; the second, to prevent persons in their last moments from being imposed on to give away their real estates from their families. The present case does not relate to the latter view; although that was a very wise one; for by that means, in times of popery, the clergy got almost half the real property of the kingdom into their hands, and indeed I wonder they did not get the rest: as people thought they thereby purchased heaven. But it is so far from being charity or piety, that it is rather a monument of impiety, and of the vanity of the founders. As to the other view, it is of the last consequence to a trading kingdom; to which the locking up of lands is a great discouragement. This indeed has not so much relation to the statutes of *mortmain*, as is thought: which had another view, viz. of services of the crown: and therefore the reasoning producing this act is more like the political reasoning relating to the statutes of *Westminster* 3. of entails. Then it would be inconsistent with that view of the legislature, if this court should decree this order, made on the *Master's* report (which would not have been made had it then been fully considered) to be carried into execution in the purchase of land; as it would be attended with all the bad consequences of such a devise of land. Where such a charity is created *de novo*, the better rule is to hold it to be laid out in some personal property; for which the funds are convenient; affording commonly a better and readier income than land: and it is worth observing, how early laws were made to prevent the mischief of *mortmain*, viz. about the third century, by one of the first *Christian* Emperors.

But upon the next objection there are reasons, why it cannot be done, supposing the rest out of the case; as things now stand, it cannot be executed entirely, and then not at all. For upon *Wolner's* death, his part is gone over to his issue in tail, an infant; against whom the court cannot decree it: as it is admitted, the court could not, if he was [224] of full age; because it has been determined, that on a bill to carry into execution a contract for the purchase of lands in the life of tenant in tail, the court would decree him to execute it and to suffer a recovery. But if he will not, choosing to lie all his life in prison, as Mr. *Savil* did, the court cannot carry it into execution against the issue in tail, claiming paramount *per Formam Doni*. It is admitted, that if the bill was on the other side by the present defendant or surviving tenant in

common, for an execution as to a moiety, the court would not execute it against the purchaser; because it is different from what was contracted for: as his meaning might be to have the entire estate: and the court pretends to decree in *specie* only; which the decreeing half would not be. On the other hand; if on the death of one of the tenants in common, who contracted for a sale of the estate, the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other. But this is not the case of a private person, but of a charity; for which the court must judge, and will not decree the money to be laid out in the purchase of an undivided moiety of an estate; obliging the charity to become tenant in common with a private person; whereas the reasons for laying it out were to have it entire: nor is any estate so inconvenient or intangled as this; which would not be for the benefit of the charity. Besides the information is to carry this scheme into execution; which would not be done by such a decree.

As to the question between the representative of the real and personal estate, it is but a consequence of the other point: and as this cannot be carried into execution, or considered as done, the plaintiff *Hort* has no right: but the heir at law must have it as land.

But there is another way of attaining this, *viz.* by a private act of parliament, enabling the infant to convey; for there have been several cases, where if clearly for the benefit of the infant, acts of parliament have been made for carrying the contract of the ancestor into execution; which would deliver me from all my difficulties: as the parties would then have the opinion of the legislature upon both points. And if they have any such thoughts, it shall stand over; otherwise the bill shall be dismissed without costs, even against the infant, whom it was proper to bring before the court (1).

(1) The bill was dismissed, without costs. R. L.

[225] ATTORNEY-GENERAL v. ANDREWS, *March 9, 1748-9.*

(Reg. Lib. 1748. A. fol. 663.)

Devise to a charity before the statute of mortmain, of copyholds *unsurrendered*, held good. Copyholds pass by a will without any witness. As to where the courts have favoured valid bequests and donations for charitable purposes (2).

Trust of a copyhold not surrendered to use of will, devised by will without any witness held good. Copyhold not surrendered to use of the will devised to a charity held good, notwithstanding the statute of frauds, amounting to a direction to the heir to make a surrender; but it is also good by way of appointment by 43 *Elis.* under which a devise of lands in tail, though no recovery is good.

Mr. Weston before the late statute of *mortmain* (o), made his will:

(o) 2 Atk. 497.

and among other things gave all his copyhold lands whatsoever and where-soever, which are or shall be purchased by him hereafter, or by any other by his direction to a charity.

He had some copyhold surrendered to the use of his will, and other copyhold not surrendered; and an information was brought for the charity.

LORD CHANCELLOR.

The extent of the description sufficiently shews the intent to be, that the copyhold not surrendered should be comprised, as well as those which were: and certainly the court would supply the defect of a surrender in such a devise as this, in favour of a younger child, besides the passing those surrendered.

The next consideration is, whether it can have effect in point of law? To which there are two objections; upon the statute of *frauds*, and upon the late *mortmain* act?

As to the latter, to lay it out of the case, notwithstanding the preamble of that statute, taking notice of such dispositions, as contrary to the public benefit; I must lay down the same rules in this case, as if no such act had been made; because this will was made before the day on which the act took place: and all the cases arising before, must be left on the same rules of law and equity; otherwise it would cause great confusion, if those wills and settlements made before, should be construed in a different way by reason of the statute, though not affected by the statute.

The question upon the *statute of frauds* is, whether the devise of these unsundered copyhold lands be good, notwithstanding that statute? In (p) *Tuffnel v. Page*, April 1740, 2 P. Wms. 262, *cestuy que trust* of copyhold lands devised it without any surrender to the use of his will; and the question was, whether the court would make that good, the will having no witness at all: and it was held sufficient to pass the trust, on the foundation of their being former determinations; holding that a devise of a copyhold, surrendered to the use of a will, by a will executed in the presence of one or two witnesses only was good (q): the estate passing by the surrender, of which the will only directed the uses; which shewed, that copyhold lands were determined to be out of the statute of *frauds*; standing on the statute of H. 8. which passes lands by will in writing, though no witness at all; of which there are several cases by Lord Coke; as of a will wrote, and not finished; which was good for so much. [226] Then there was no more ground of law to exclude a will without any witness at all, than a will without three witnesses. Perhaps if these determinations were now originally to be considered, courts of law and equity would not have gone so far; and it may be wished it was altered, as it is subject to the same inconvenience as a devise of freehold lands. But I cannot set up fanciful distinctions; nor does that being the case of a trust make any alteration. Here the testator was seized himself: might have surrendered, and has not. The legal estate cannot pass; the question is, whether it does not amount to a direction to the heir at law to make a surrender to the use of that will; and on the foundation of copyhold lands not being within the statute of *frauds*, but standing on the foot of the statute of H. 8. I am of opinion it does.

But this is a distinct point, from the supplying a defect of surrender to the use of the will for a child: for which the aid of a court of equity is wanting to compel such surrender: this being a devise to a charitable use, which will be made good by way of appointment, by the very strong and general words of 43 *Eliz.* For why not as well as the want of suffering a common recovery of lands in tail given to a charity? Which, if not so expressly determined, has been allowed by the court, and argued from: the appointment standing in the place of a recovery; not requiring the coming here, to compel the issue in tail to suffer a recovery (1). Consequently here is no surrender wanting, as there is where the statute of charitable uses does not interpose: as in a devise to a younger child, who must come here for a decree to have it supplied. Nor will I make a decree for it; but will decree, that the trustees for the charity be admitted.

(1) See 2 Vern. 453. &c.

GOODWYN v. GOODWYN, *March 11, 1748-9.*

(Reg. Lib. 1748. A. fol. 678.)

Devise of "all messuages lands, &c." will pass copyholds, where the introductory words shew testator's intent to dispose of all his estate."

After-born children included in a devise to (1) "A's," children. Satisfaction. What passes by the word "estates, &c." either alone, or with the addition of other words (2). Weight to be laid on introductory words of a will shewing intent to dispose of all.

Defect of surrender to be supplied only for wife or child.

Estate, when used generally, includes not only the lands or thing, but also the estate or interest, so if *in* or *at* such a place is added; but if it is further added in the occupation of particular tenants. Q.

HENRY FRAMINGHAM, having used some introductory words in his will, shewing an intention to dispose of his whole estate (r), and leave no part to descend; gives all his messuages, lands, tenements, and hereditaments whatsoever in *Norfolk* to his wife for life, if she should so long continue a widow; and after her death to his daughter *Joan*, wife of Sir *Peter Seaman*, for and during her life, and afterward to her children; to be equally divided among them share and share alike; and for want of such children, to his right heir on the side of the *Framinghams*.

Lady *Seaman* had three children; a son *Thomas*, and two daughters: *Jane*, married to Sir *Henry Nelthorp*, and *Elizabeth* married to *Goodwyn*.

[227] Sir *Peter Seaman* by will give £4000 portion to his daughter *Jane*, annexed a condition thereto, that when she arrived at full age, she should release to her brother *Thomas* all her interest and share under the will of *Henry Framingham*.

Thomas by his will gave to his sister *Elizabeth* all his estates in *A.* in *Norfolk*, now in the occupation of *B. C.* and *D.*

The first question arose on the demand of *Elizabeth*, for an account of

(r) *Ante*, 10. 2 Vol. 48.

(1) See *Leake v. Robinson*, 2 Meriv. 382.

(2) Vide *Jshell v. Beane*, ante, 215. Also, *Baillis v. Gale*, post, 2 Vol. 48. and *Nicholls v. Butcher*, 18 Ves. 193, 195.

one-third part of the rents and profits of the freehold and copyhold estate in *Norfolk*, accruing from the death of Lady *Seaman* to the death of *Thomas*, viz. whether the copyhold, being surrendered to the use of *Henry Framingham's* will, was comprised in the general words thereof?

Lord Chancellor was of opinion, that the copyhold lands were comprised from the intent to pass them: although there are several cases, that a devise in general words of all lands and tenements will not comprise copyhold lands (*s*), which are not surrendered to the use of the will, so as to shew an intent to comprise them. And where the intention of the testator of raising portions or payment of debts may be answered by freehold lands, the court will not suppose he intended to pass the copyhold: and although surrendered, yet if the words are not sufficient to take them in, they will not pass. But here they are sufficient, and the surrender effectuates that intent; which appear also to be, that *all* his estates and interest should pass; upon which the court has in several cases laid great weight. But by *Lord Talbot* in *Ibbetson v. Beckwith*. The consequence of their passing is, that Lady *Seaman* took only such estates, as were given by the will; and any admission of hers, as being heir at law to *Henry Framingham*, could prejudice no other person's right.

Then supposing them to pass: the next question was, what interest, after the estate for life of Lady *Seaman*, *Elizabeth* had, who was not then born?

LORD CHANCELLOR.

That will not vary the case; for wherever there is a remainder to children by a settlement or will, it is not material whether they are alive or not; for it will vest in different parts and proportions, as they come in *esse*. Then the consequence of the first opinion is, that *Elizabeth* was intitled to one-third of the profits to the death of *Thomas*: and as to the interest these several children took under this devise, it clearly is as tenants in common for their lives only; remainder over to the heir on the side of the *Framinghams*; and this according to *Wild's* case which is in the same manner; only this is stronger; as *children* can be only a description [228] of their persons; and their being no words of limitation, it cannot be carried further than for life.

The next question was, upon the demand by *Elizabeth*, of the whole profits of this estate from the death of *Thomas* to this time, which depended on the wills of Sir *Peter* and of *Thomas Seaman*. First, whether under Sir *Peter's* will *Thomas* became intitled to that one-third belonging to Lady *Nelthorp* for her life, as one of the children of Lady *Seaman*, by the condition annexed to her portion?

Lord Chancellor was clearly of opinion, that he was; for part of the portion having been received, it was a submission to the will; nor could she claim both, or be now at liberty to resort back to the copyhold estate: and so it would be according to *Noys v. Mordaunt*, supposing it had not been annexed by way of condition.

Then the question was, whether it passed by the will of *Thomas* to his sister *Elizabeth*; there being no surrender to the use of his will?

(s) If surrendered they will pass by will not duly attested to pass lands. 2 Brown, 58.

LORD CHANCELLOR.

According to the common rule, it could not; nor would the court supply the defect of surrender: it being from a brother to a sister. The court has refused it even in the case of a grand-child; and only does it for a wife or child. But it depends on Lady *Nelthorp's* taking freehold lands under the will of *Thomas*, and the *Master* must see, what is most for the benefit of the infant children of Lady *Nelthorp* to claim by.

But supposing the copyhold to pass by the will of *Elizabeth*; the question is, for what estate and interest? It being insisted, that it passes in fee by force of the words *all my estates*; but of that I very much doubt. There are several cases on this head (1); and the general rule is, that the word *estate* includes not only the lands, or thing which is the subject of the devise, but also the estate or interest therein (1). As in the case of the Countess of *Bridgewater* v. Duke of *Bolton*, [1 Eq. Ab. 178.] But that case was, where the word *estate* was used generally, *all my estate real and personal*; here the word *estate* is limited in point of place; and though in later cases, as *Taffnell* v. *Page*, Barn. Ch. Rep. 9, and *Berry* v. *Edgworth*, [2 P. Wms. 524.] have (u) gone farther than the Duke of *Bolton's*; and have held that by devise of all my estate in or at such a place (between which words in in or at an idle distinction has been made) not only the lands themselves, but all the interest therein passes, and so in 2 *Lev.* 92, by *all my tenant right estate*; yet there is no case where it been so held where there is a farther description, as here, in the occupation of particular tenants (1). The objection is, that this description confines it to the lands themselves; and certainly nothing was in the occupation [229] of these tenants but the lands themselves, and nothing of the interest or fee which was in the testator. Yet the answer given to this deserves consideration: that where the description has been by the locality, it has been held both in law and equity to comprise the interest; and there is no reason why the other words, in the *occupation*, &c. should restrain it more than the locality, which will not. But though the estate and interest in lands is not strictly local; yet it is attendant on a thing which is local. But this is also *estates* in the plural number, which in common parlance means a description of the lands (2). As this case therefore is particular and new, and none have gone so far, I will give no opinion now; but if it be material to the parties, will make a case of it, or put it in some further method of being considered (x).

(1) 2 Vol. 164. 582. 2 P. Wms. 490.

(u) *Barnard*, 9. 2 Atk. 38. 3 Atk. 486. *Cowper*, 306, 355. *Douglas*, 734. 2 Vol. 48, 176, 614.

(x) In devises as well as deeds, if no words of limitation are added, devisee takes only a life estate: but as no technical words are necessary in a will, if testator uses words tantamount as *all my estate*, &c. that will carry *all his interest* in the land devised; but there must be words in a will, either expressed or implied, to controul the rule of law. Per Lord *Manfield*, *Cowper*, 659.

(1) See 2 *Cox*, P. Wms. 525, note, and *Peltiward* v. *Prescott*, 7 Ves. 541.

(2) This has always been acceded to, see 2 T. R. 656.

TAYLOR v. PHILIPS, *April 13, 1749.*

(Reg. Lib. 1748. B. fol. 501.)

S. C. post. 2 Vol. 23.—Feme covert without husband's joining, but in his presence surrender her copyhold to use of her will or appointment, and devises it. Q. whether good?

Fine by feme covert good against her heir by estoppel.

A WOMAN, seised of copyhold land, marries: and during coverture, without her husband's joining, but in his presence, surrendered to the use of her will, or writing in nature of an appointment or will; and devises it to the defendant Sir *Nathaniel Edwards* (1).

It was argued, that a surrender by a *feme covert* without the husband is void; as a fine is without his concurrence: and then his presence or consent in *pais* will not make it good. Then such a surrender will not enable her to make an appointment or will: all such wills are appointments, and the reason that copyhold is not within the statute of frauds is, because it passes by the surrender, not the will: and it must be pleaded as a surrender. Subsequent marriage is a revocation of a surrender made before, and puts her under a disability to make an appointment. It was so held in *C. B.* at the *sittings after Mich. T. 1747*: and the heir at law recovered against the devise of the wife.

For the devisee. This surrender is ambulatory, as the will itself is, and passes no interest at the time it is made; and not like a surrender to the use of another person, which takes effect immediately, and cannot be revoked. Nor does any thing pass from the husband; it being claimed merely under the interest of the wife, and after her death. If a wife levies a fine of her own lands, and the husband makes no declaration against that during his life (as he may thereby avoid it) it will be good against her heirs, and bind them. 10 Co. 43. Bro. 77. This is good as an appointment, which a *feme covert* may make; but it would have been good as a will, although those words of *appointment* had not been added; for which there is a strong case in the *House of Lords*.

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LORD CHANCELLOR.

That was another point. I am doubtful about this, abstracted from the custom, how far this can be a good surrender to the use of the will. The person must take the lands by the surrender; of which the instrument of appointment only directs the uses; because he must come in under the estate of the lord, and by that *medium*. It makes no difference, that this passes no interest at the making; because there must be a surrender of the estate into the hands of the lord to make it take effect immediately or in *futuro* by the appointment to be made. It is not material, whether the uses are to arise immediately or by subsequent act of appointment; for it must be by the surrender: and in order to that, the estate must pass into the hands of the lord; through which it must be taken. The question then is, whether the wife can surrender that estate into the hands of the lord, so as to make it effectual? A fine differs from the case

(1) The will was made with her husband's privity and consent. R. L.

of a surrender; for that will be good against the heir by estoppel, although it passes no estate at all: but if a surrender is not good, there will be no estoppel, and no estate can pass into the hands of the lord. If the fact concerning the custom of the surrender was before me, I might make a case of it; but as it is not, it must be tried: but the frame of the surrender creates a probability that there may be such a surrender; otherwise, it is strange that the steward should take it, when the husband was present.

AYRES v. WILLIS, *April 13, 1749.*

(Reg. Lib. 1748. A. fol. 585. Entered *Ayres v. Carte.*)

Devise of residue of personal estate to his wife, bars not her claim to dower.

Legacy by a father to a child intitled to a rent-charge out of an estate devised to another, the child still intitled to the rent-charge.

(y) A MAN by his will, taking no notice of his wife's right to dower, makes a provision for her out of the personal estate by way of residue.

This was insisted upon to be an implication to bar her of dower.

LORD CHANCELLOR.

No case to that purpose. This differs greatly from *Noys v. Mordaunt* and the several other cases; since which the rule has been, that if a provision (even personal according to latter determinations) is made for a child, whose estate by the same will is devised away, if he claims under the will, he cannot have the other; but here by the claim of dower the wife does not break in on the will; and this is the stronger, as it is only a residue, which accidental benefit he might intend, she should [231] have as well as dower.

Suppose a child is intitled to a rent-charge or such an interest out of a real estate belonging to his father, who makes a provision for him by legacy or portion, and devises that real estate to another child, without taking notice of the rent-charge: that child is intitled to the rent-charge, as the father did not shew any intent to exclude it; for that does not defeat the devise; which the court will not suffer.

(y) In *Prec. Chan.* 133. a devise of lands by husband to wife, who is intitled to dower, without saying in recompence of it, held to be a voluntary gift, and no bar of dower: and in *1 Brown*, 445, husband gave an annuity to his wife in lieu of all benefits from his estate. She elected her dower, but lost the annuity. *1 Inst. Harg.* ed. 36. *2 Eq. Cas.* Ab. 389. *2 Vern.* 365. *Viner*, tit. *Devise*, 366. *9 Mod.* 152. *2 Atk.* 427. In *1 Brown*, 292, a rent-charge was held not a bar of dower unless so expressed, or the intention appeared by the value of the lands being too small to satisfy both. Lord *Loughborough* said the law is settled and plain, that it depends on the language of the will. [See also ante, 54, 55. *2 Ves. jun.* 572. and *3 Ves.* 249.]

GOODINGE v. GOODINGE, *April 24, 1749.*

(Reg. Lib. 1748. A. fol. 619.)

Bequest to such of nearest relations, as *A.* should think poor, and objects of charity, confined to those within the statute of distributions, under *A.*'s advice.

Devise to his nearest poor relations. Parol evidence admitted to shew that testator knew he had such in *Salop*, but no farther; not to prove declarations or instructions whom he meant by the written words of the will.

A MAN devised a legacy to such of his nearest relations, as his executor should think poor, and objects of charity (*z*).

For the plaintiffs was cited *Attorney-General v. Buckland, June, 1742*, where his *Lordship* held, that if the word *relations* only was in a will, it should be confined to the rule of the statute of distribution; but not where there was the addition of *poor, &c.* And evidence was offered to be read, of the testator's intention not to confine it, for that though parol evidence will not be admitted in many cases, as to increase a legacy, &c.*; yet it may to prove the circumstances or situation of the testator, his estate, or way of thinking.

But *Lord Chancellor* would not suffer it; for though it has been allowed to ascertain the person or thing, as where two were of the same name; yet not to shew that the testator meant to use general words in this or that particular sense; nor can it be read to shew that the testator was offended with any one, and said, he should not be included in the number of relations.

Evidence was then offered to the testator's having poor relations in *Salop*, and that he knew thereof; to which was objected the rule by *Holt*, C. J. in *Cole v. Rawlinson*, that the intention of the testator is not to be collected from collateral and foreign circumstances. [*Salk.* 234. 2 *Lord Raym.* 831.]

LORD CHANCELLOR.

That rule is laid down much too large by *Holt*; for in several cases it is admitted, that it must be allowed, *viz.* where the description or thing is uncertain (not only where two of the same name) it must be admitted to shew, that the testator knew such a person: as where the testator described a legatee by a wrong name, which she never bore, parol evidence was allowed by the *Master of the Rolls* to shew, that the testator knew such a person, and used to call her by a nick-name (1). (a) Although parol evidence cannot be read to prove instructions of the testator, after the will is reduced into writing, or declarations, whom he meant [232]

(s) 2 Vol. 216. *Proc. Chan.* 229. *Brown*, 475. 2 *Atk.* 239, 378. 3 *Atk.* 258. 2 *P. Wms.* 136. 2 *Vern.* 576, 593, 614, 677. 2 *P. Wms.* 158, 160. In 1 *P. Wms.* 9. it was held to be dangerous to admit parol-proof where there was a written will, but as to personal estate such proofs have been allowed, 1 *Vern.* 31, but they ought to be plain and indisputable. In 2 Vol. 23, *Lord Hardwicke* said, such evidence has been admitted to rebut an equity arising from a resulting trust, 2 *Vern.* 667, but since *Brown* and *Selwyn*, *Talb.* 240. he has been tender of admitting it in such cases, but always does to ascertain identity, or in case of collateral satisfaction. 2 Vol. 219. 1 *Wils.* 313.

* 1 *Brown*, 448. 472. (a) 2 Vol. 527.

by the written words of the will; yet that is different from reading it to prove, that the testator knew he had such relations; to establish which fact, it may be read: but not to go any farther. And though this is a nice distinction, yet it is a distinction in the reason of the thing; nor can any mischief arise from admitting it.

It being read, *Lord Chancellor* said it signified nothing; for that the plaintiffs could not be let in without rejecting the word *nearest*: to which it tended by such a construction as it would extend to the most remote relations. And the bill was dismissed.

KING v. PHILIPS, [*May 6th,*] 1749.

(Reg. Lib. 1748. B. fol. 413. Entered *King v. Norman.*)

Legatee being a creditor under the testator, her father's marriage articles, an account directed of testator's personal estate at the making his will, and his death, the legacy being so near in value, that it might defeat the rest.

In this cause the question was, whether the plaintiff could take as a creditor under articles, and also as legatee under a will? it being urged for the defendant, that the legacy was of equal value with the whole personal estate: which would defeat the intention of the testator of giving any thing to the other legatees.

LORD CHANCELLOR.

This legacy being so near in value to the personal estate, that it will defeat the rest, I will do what *Lord Jeffries* and *Lord Comper* have done in such a case; direct an account to be taken of the value of the personal estate at the testator's death, and at the making the will; which fact may give some light as to the intent, and is a fact necessary to be known, before I determine it. But if the personal estate had been so large, that this legacy would only occasion an abatement in proportion of the rest, it may be otherwise; for though the law leans against double provisions, yet when it comes to be a question between a child and other legatees or collateral relations, that does not weigh much.

SAYER v. PIERCE, *May 1,* 1749.

(Reg. Lib. 1748. B. fol. 255.)

Account of profits of coal mines not decreed without shewing possession; the bill retained, with liberty to bring ejectment.

THE bill was for an account of coals dug: and to ascertain the boundaries between the plaintiff's and defendant's lease of a colliery.

It stood on two foundations of right: first a lease by the late Bishop of *Durham* to the plaintiff's father; but under that, no possession was gained by the lessee: who only came upon the place, and forbade the defendant from working therein. Secondly, a lease by the present Bishop
[233] on the expiration of the former: which lease still existed; but

not even so much was done by the present plaintiff towards gaining possession, as by the former lessee.

LORD CHANCELLOR.

Can I decree an account of the profits of a colliery for a person who does not do some act to shew possession? without this, neither an action at law or bill in equity, can be maintained for the rents of an estate, whether land or a colliery: there not being a title to receive them till possession. The defendant having got possession, the lessee's plain remedy was, as the mines were open, to have brought an ejectment; in which a recovery would have extended to the whole, and no need to bring other ejectments. The only ground for relief is from the confusion of boundaries: to ascertain which still something must be done by the court after the ejectment; and then it will be necessary for the plaintiff to resort back to the court. All I can do is, to retain the bill for a year, with liberty to the plaintiff to bring an ejectment.

For defendant it was insisted, that the bill ought to be dismissed entirely; the plaintiff not having a certain right in law. In *Strickland's* case a bill was brought against one tenant, for pulling down an inclosure: the court dismissed it with costs, and would not retain it, or try a legal title, which ought to be ascertained at law: although there was a strong reason for it, as the court leans against pulling down inclosures: but if there was no entry, lessee for years (according to *Plowden*) can no more bring an ejectment than an action for mesne profits.

For plaintiff: Where the assistance of this court is necessary to a trial, the plaintiff's proper way is by a bill here, and not first to sue at law. So whenever the party must have relief consequential upon a legal title, as if he wants a perpetual injunction, or delivery of title deeds, the legal title must be established under the authority of this court, or all other actions before are nugatory: so in case of a will, which is a legal right; and yet any consequential equitable questions are tried under the direction of this court, and no occasion to bring an ejectment first. Where matter of law is joined to equitable relief, this court takes jurisdiction of the whole; as if plaintiff is intitled to a discovery of assets, so that it is necessary to come here, this will not be a handmaid to other courts: it is not proper to come here barely for a satisfaction of waste, as a bill singly for cutting down timber; but otherwise if also to restrain farther cutting. Actual entry makes no difference; it not being necessary to give all that right which lessee for years could convey. It has been held not necessary unless to avoid a fine: and that confession of lease, entry and ouster, did not confess actual entry, here material: but if necessary, that of itself is sufficient ground to come here for relief, as formerly it was for legatee to get consent of an executor: for without leave, entry into the [234] mine cannot be; and entry on the land signifies nothing.

LORD CHANCELLOR.

It is very clear, that the utmost I can do is, what was before mentioned. This is a case, in which the plaintiff wants the assistance of this court in order to try a title; there being no deeds or writings in custody of defendant; in which case it would be inconsistent to bring an ejectment first, without the aid of this court. It is difficult to go through with an action

at law in case of an account of the profits of coal mines; and therefore this court would go farther than in other cases. But it is the same as a bill for an account of rents and profits of an estate, which cannot be maintained entirely on a legal title, unless infancy or something in the way, so that no recovery can be maintained without it. Any difficulty from the mines being unopened is out of the case; the first complaint of the bill being to the contrary. The question is not, whether actual entry is necessary; and I deny, that without that an ejectment cannot be brought; for the common rule obliging the defendant to confess lease, &c. is in law sufficient to support that. An ejectment therefore would properly have determined the right; and had it been merely on the account of the profits, the bill must be dismissed: but being to ascertain the boundaries, the plaintiff may, if he recovers, want that relief; and then if leave be given to bring an ejectment abstracted from the direction of this court, he must bring a new bill: and should it be dismissed entirely, he would be deprived of an injunction, if wanted.

COOKES v. HELLIER, May 3, 1749.

(Reg. Lib. 1748. A. fol. 657.)

A person taking a benefit in personal or real estate under a will, must abide by it *in toto*. Therefore an unsurrendered copyhold decreed to pass (1).

Evidence the same here as at law, on a casual destruction of deeds: but otherwise where a spoliation.

One taking a real or personal estate under a will must abide by it *in toto*.

SIR THOMAS COOKES devised a copyhold, among other estates, to his heir at law Sir Thomas Winford for life, with remainders over; making him also executor and residuary legatee of a large personal estate. The copyhold did not appear to be surrendered to the use of the will. Sir Thomas Winford took a new enfranchisement of the estate from the Earl of Plymouth lord of the manor; in which he recited himself to be executor and devisee of Sir Thomas Cookes. He afterward makes a conveyance, reciting the deed of enfranchisement, by which he creates a term of one thousand years in trust to raise money for payment of his debts after his death: the residue of the trust to be for the benefit of the remainder-man in the will of Sir Thomas Cookes.

The remainder-man after death of Sir Thomas Winford brings this bill against his devisee to have a conveyance of this enfranchised [235] copyhold estate: insisting that there was sufficient ground to presume a surrender, and that it was lost when the court rolls were burned; and that one cannot dispute the will under which he has benefit.

For defendant. No evidence has been given of a surrender: and the mere loss of court rolls alone will not induce the court to presume it ever existed; for though a surrender may be presumed, as well as any other deed, that must be upon some ground, as enjoyment, &c. But the acts done by him are inconsistent with his taking under the will, by which he

(1) See *Allen v. Poulton*, ante, 121, 122.

had not power to do so ; which shews, he claimed as heir at law, and must be taken to be in under his better title.

LORD CHANCELLOR.

The intent of the first testator plainly was to include this copyhold : but to make it pass at law it ought to have been surrendered. The presumption, that it was, from the court rolls being burned, is mere matter of law (b). Nor will this court go upon presumption of evidence, any more than a court of law. Although, if deeds or writings are destroyed by a party, who would take benefit thereof, a court of equity in *odium spoliatoris* will go farther than a court of law. As in Lord *Hundson's* case, *Hob.* and several cases since. But if it be a casual destruction, the evidence is the same here as at law. But there is another and better presumption, from the infranchisement, which creates a presumptive evidence, that Sir *Thomas Winford* was admitted under the will of Sir *Thomas Cookes* ; for it is unnatural to suppose the lord of the manor would grant an infranchisement till he was admitted ; which might then be granted to him, if he thought fit to come under the will, as he was himself heir at law, and so no other person to dispute it with him.

(c) That a person enjoying a benefit under a will must abide by it *in toto*, has been held in modern cases, as well in taking a personal as a real estate under the will : and then his devisee is bound by such acquiescence, and cannot dispute it. And the evidence of this is very strong : particularly from the infranchisement ; for if he had intended to take as heir at law, he would have styled himself so. The objection for the defendants from the act of Sir *Thomas Winford* being inconsistent with his taking as devisee, has some weight : but that very conveyance is on a recital of the deed of infranchisement ; in which he styles himself devisee. And his limiting the residue, after performance of the trust, for the benefit of remainder-man shews, he intended the rest of this term should attend the inheritance ; so that the plaintiff is intitled to this estate.

(b) 2 Eq. Cas. Abr. 236. 1 P. Wms. 733. 2 P. Wms. 748. Post, 389, 505. 2 Vol. 253 ; these cases shew what evidence is required where deeds have been lost, &c.

(c) 2 Vol. 33.

PECK v. PARROT, May 5, 1749.

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Grant of personal estate by a deed to trustees for a niece after the death of grantor, in whose life niece dies ; it goes to representative of niece, not to executor of grantor. Contingent interest will go to the representative.

Mrs. BOUCHIER by deed in consideration of natural love and affection to her niece, and to secure to her separate use her personal estate after her own death (d) grants to trustees all her money, securities for money, and all and every other goods, chattels, wearing apparel, and personal estate whatsoever, upon a trust to permit the grantor to use and enjoy, have and receive the benefit and profit thereof to her own use for her natural life : and immediately after her decease, and payment of her debts and funeral expenses, for the sole and separate use of the niece alone, and not for her husband, or at his disposal, and not otherwise ; or

(d) Ante 47. 2 Vol. 118, 119.

for such as she should appoint; her receipts to be a sufficient discharge to the trustees.

The niece died in her life: and after the death of Mrs. *Bouchier* this bill was brought by her executor and residuary legatee for this personal estate against the two daughters and representatives of the niece; who insisted, that the intent was to give the niece a vested interest in this whole personal estate, after her own interest for life, having reserved to herself only an usufructuary interest for life: and therefore it would go to the representatives of the niece.

For plaintiff: It appears from the deed to be intended a mere personal bounty to the niece, and not to go to her representative, or any person but by her particular appointment, consequently testamentary, and void by her dying in life of Mrs. *Bouchier*. If to be considered as vested: it might have gone to the husband, if he had survived the niece, which was evidently contrary to the intent.

LORD CHANCELLOR.

This is a very particular case. The material question is whether this deed is to be considered merely as a testamentary act, so that by dying in the life of Mrs. *Bouchier* that disposition is at an end, and it would be in her power to make any change or alteration in it; or as a grant or disposition upon contingency, not testamentary, but to bind her so that no act she could do by her will, could alter it. If any circumstances shewed this deed to have been obtained from her by fraud, being a mere voluntary deed, without power of revocation, that would have gone far to have set it aside: but as there are no such circumstances, it must be taken to be fairly executed; and the intent and operation thereof to be considered. No other intent can appear except to bind her own hands, and preclude herself from making any disposition to the contrary. I cannot [237] quite say, it intended to give a vested interest to the niece: being only the surplus she should leave at the time of her death after debts and funeral expenses; and was so far contingent, as it was uncertain, what she would leave. As to personal chattels in possession, it might pass the legal property; but not of *choses in action*, even to the trustee. This is different from an usufructuary interest for life: for she might have taken away and sold any part of this personal estate; she might have spent the whole by contracting debts for valuable consideration, to the value of the whole; for not only by the operation of law, but of this deed, whatever debts she contracted were to be paid out of her personal estate: and it is absurd to suppose she would pass her wearing apparel to the trustees during her life out of her disposal.

(e) But though this is not a vested interest, that will not determine the question; for a contingent interest may pass to the representative, as well as a vested interest; for which there are several determinations under deeds, but frequently under wills. As a contingent legacy, though he dies before the contingency happens, will go to his executor or administrator, though not mentioned; so under a trust, a contingent interest may go to executor or administrator though not vested in the person during his life; and in the same manner will this contingent interest go to the niece.

The words put to exclude the husband, have not the construction con-

tended for on the part of the plaintiff; for the property is thereby notwithstanding in the *feme covert*, to whom it is so limited. Nor is it absolutely confined to that method of appointment; for suppose both the niece and her husband had survived Mrs. *Bouchier*, and theniece died without appointment, notwithstanding those strict words, it would go to her representative although it was the husband; yet that would not be according to the words of the deed, because she made no appointment; for these words have a greater effect than merely to exclude the husband: for they carry the property with it, which will go to her representative; for she had the giving her property by this deed as much in view, as the personal benefit of the niece and exclusion of the husband.

Then between two volunteers, one claiming under this deed, another under the will, I cannot say this deed, made in her life should give way to her will; which can only be by saying this deed is a will. And that is directly contrary to her intent: which was to prevent her being imposed on in making a will; and this is dressed up to defeat the deed only.

Dismiss the bill without costs.

ROBERTS v. KINGSLEY, *May* 5, 1749.

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(Reg. Lib. 1748. B. fol. 237.)

See Miffl. Plead. 69. 3d. Ed.—Mistake—Election—Satisfaction—Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles *verbatim*, and both made before marriage. The plaintiff, however, having taken a benefit under the will which he disputed, held to have made his election: and decreed to give up part of the settled estate in satisfaction.

(f) By articles before marriage an estate is agreed to be settled on the husband for life *sans waste*; remainder to the heirs-male of his body: with power to raise portions for younger children. A settlement is afterward made also before marriage, in pursuance of the articles, and observing the very words of the articles. The husband levies a fine, declaring the uses to himself in fee; and by his will makes a provision to trustees for payment of his son's debt; for which purpose they were to make proposals to his creditors. The trustees file a bill, to which the son was made party, against the son's creditors, to elect whether they would accept the proposals or not: in consequence of which a decree is made.

The son brought this bill to have the settlement rectified, according to the intention of the articles: which was to make his father tenant for life only, although the words both of the articles and settlement in construction of law made him tenant in tail; for if such was the intent, it was needless to give him the power to raise portions; before marriage, indeed the parties might come to a new agreement; but the settlement itself, being in pursuance of the articles, excludes any such notion. This was done by the *Lords* in *West v. Erisey*, 2 P. Wms. 349. although the party there claiming it stood in a weaker light than the present plaintiff; nor is the father's will any obstacle to this, for though the general rule is not to be disputed, that one, who takes any thing real or personal under a will,

shall be precluded from litigating any part of the will, as having conveyed away an estate, in which he was intitled to a limitation; yet nothing was here given to the son by the will. It was not in his power to prevent the proposals from being complied with; and though his debts would be thereby discharged, that is not such a benefit as is within the rule, which will not be carried farther. Beside at the time of making him a party, he was not conusant of his right, not having then discovered the articles; so that he shall not be estopped thereby, supposing it was a direct devise to him.

This fact of the time of the discovery of the articles, not being sufficiently made out, *Lord Chancellor* put it into a method of inquiry. And upon its coming back it appearing that they were not discovered to the son till after the making that decree; he now delivered his opinion.

[239] LORD CHANCELLOR.

The general run of the cases, where these settlements are rectified, has been, where the articles only were before marriage, the settlement afterward: and though a distinction has been sometimes made, where both were before marriage, yet there have been cases of it. *West v. Erisey*, was stronger against the determination than this case; which is clear of most of the objections there. The cause of the doubt in that case, and of the admission of the bill in the court of *Exchequer* was, that it was not in favour of the heir*; the limitation there being to the heirs-female of the body, and therefore not sufficient ground to say that heirs-female of the marriage was descriptive of the daughters of the marriage, so as to make them purchasers. But the *Lords* were of opinion, that, although the settlement was made before marriage, it ought to be reduced to a strict settlement on the daughters in tail, which prevailed against the fine and disposition of their father's will. But this is devested of these circumstances, being the common case; the variation from the intent of the articles and from the ordinary course of settlements not arising from any new agreement (g) (being made in pursuance of the articles) or fraud, but from mistake, in not attending to a strict settlement. The reason of which is unanswerable, viz. that on a settlement for valuable consideration to make the father tenant in tail would be nugatory, and the same as making him tenant in fee.

But the son having submitted to and taken a benefit under his father's will, must be bound thereby; for what was applied for the payment of his debts, was for his benefit, and the same as if paid to himself; therefore though he is intitled to relief, and to have the settlement rectified according to the true intent of the articles, he must be now considered in the same light as if he had then discovered them, and cannot retain both, but must make his election.

* In 2 P. Wms. 536, a remainder in marriage articles to the heirs of the body of the husband by his first wife, was held not to extend to daughters, but in 3 Atk. 271, issue was held to extend to female as well as male. Vide 2 P. Wms. 356. 4th ed. note 1.

(g) If the settlement is not said to be in pursuance of the articles, it will not be rectified, though both articles and settlement were made before marriage. Talb. 20.

WEST v. SKIP, [May 5th,] 1749.

(Reg. Lib. 1748. B. fol. 517.)

See also post, 456.—Partnership—Bankruptcy—Representatives of partner entitled to set off debts, and have all allowances before the separate creditors of the other can take his share; and they have a lien for such demands.

Partners continue joint-tenants in the stock notwithstanding its changes in the course of trade, and are seised *per my and per tout*, and on account each must have all allowances before a judgment-creditor of the other can come on the other's share: And surviving partner is considered as a trustee for representative of the deceased, who has a specific lien, but such lien may be lost by laches or consent to leave the goods in the power of the other, who afterward become bankrupt; which may bring it within 21 J. 1. c. 19.

Whether the property of goods is affected by a *lis pendens*, Q.

A partnership lien is not appropriated to the original stock, but also to the produce.

On a bill to carry into execution a former decree, the court may re-consider the directions, and whether any mistake.

A PARTNERSHIP was entered into in a brewery between *Skip*, and *Ralph* and *James Harwood*, and particular terms then agreed on between them, that *Skip* should have such a proportion of the outstanding debts, and a lien and security on the partnership stock, to make that share of those debts good to him according to the value set on them, with penalty in case of a breach.

After this some difference arose between them on a suggestion, that *Ralph Harwood* drew more than he ought out of the stock, and received debts without the privity of *Skip*, with several other [240] breaches of covenant and misbehaviour; which produced an action by *Skip* for the penalty of the articles; in which a judgment was recovered. But before execution thereon *Ralph Harwood* confessed a judgment to his sisters; who took out execution by *elegit*, and laid hold of the partnership stock, which was assigned by the sheriff.

Skip, insisting that this was a fraudulent act to cover the effects, took out a commission of bankruptcy against *Ralph Harwood*: upon whose application to supersede it, issues were directed to try whether he was a bankrupt or not at the time of the commission. But instead of trying it, the partners came into a rule by consent by order of *Nisi prius*, which was afterward made a rule of C. B. and which order was, that *Ralph Harwood* should execute a bond with penalty to *Skip*, and procure two other bonds with penalty conditioned to pay to *Skip* what should be due to him on the day of the date of the order, with the interest; and ordered with like consent, that the partnership should cease as on that day, and the account of the partnership trade should be carried on to that day, and no farther: and that upon *Ralph Harwood's* giving such security as before mentioned, the commission should be superseded, the officers discharged, and the effects delivered.

Under this order nothing effectual was done; the whole thereof depending upon *Ralph Harwood's* giving the security therein mentioned; which he not performing, motions were made in C. B. for attachments against him for contempt in breaking this rule; which, being found to be only a personal remedy with no effect, produced an application to *Chancery* under the commission of bankruptcy: and by consent of the parties it was ordered, that the rule of C. B. should be discharged, except so much as related to the dissolution of the partnership; and ordered to restrain *Har-*

wood from disposing of any of the effects except in the way of trade; and that it should be tried again. On the trial a verdict was found, that at the time of issuing the commission *Harwood* was no bankrupt: and ordered, that the commission should be superseded.

Skip filed a new bill in this court, setting forth all this: praying an account and satisfaction for the breaches of covenant, and to be paid what was due to him out of the goods and effects taken in execution; and that the defendant might be restrained from getting in the partnership effects to his prejudice.

The cause was put off several times, that *Harwood* might find security, to prevent the appointing a receiver. But upon his not doing it a decree was made and a receiver appointed. It appeared afterward, that *Harwood* had endeavoured to secrete the effects in a very extraordinary manner during the hearing of the cause, after the propositions made [241] to him, and time given him to comply therewith; getting in the debts, and giving receipts where nothing was paid; which produced a commission of bankruptcy by other creditors eight days after making the decree: and these acts of *Harwood*, done really to elude the decree and appointment of the receiver, were now set up as acts of bankruptcy.

This occasioned new contests, and a new bill by the assignees, insisting that *Skip* had no property either legal or equitable against them: but that his debt ought to be levelled with all the other debts of *Harwood*; and he be considered barely as a creditor.

And *Skip* brought a bill to have the partnership estate first disposed of for his satisfaction: and that nothing should be considered as belonging to the *Harwoods* till after that deduction: and to carry on the former decree.

LORD CHANCELLOR.

The main, if not the only question is, first, whether *Skip* has any interest in, or specific lien upon this stock? Another and very different question, (though it has not been treated as different at the bar) is, whether the sisters, defendants to both bills, are to be considered, as between them and the assignees, as having any interest in, or specific lien upon this stock: the first decree having considered them, from the time of the *elegit* as partners?

The first must be considered in two lights; first, whether *Skip*, as between him and the *Harwoods* is to be considered as having any specific interest at the time of the commission. Secondly, supposing he had, whether any thing happened to vary that right, as between him and the assignees; particularly whether this specific lien is gone by the 21 J. 1, c. 19, and these goods to be considered as the effects of the bankrupt, to be distributed among all the creditors.

As to the first, it is insisted, that from the dissolution of the partnership by the order of *nisi prius*, *Skip* had parted from or varied his specific lien in the goods; and had resorted by consent to take personal security for his demand: and that, however that be as to the old stock, yet as the new, he certainly can have no specific property, interest, or lien thereupon. It is necessary to consider what kind of lien *Skip* had originally, as between him and the other partners; then how it was after the dissolution: then

how it would have stood, if the question had arisen between the representative of a partner and a surviving partner; as that will go a great way to determine the other.

* The partners themselves are clearly joint-tenants in the stock and all effects: not only that particular stock in being at the time of entering into the partnership; but to continue so throughout; whatever changes might be made in the course of trade. Otherwise it is impossible to carry it on. † And being seized *per my & per tout*, when an account is to be taken, each is intitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought: and nothing is to be considered as his share, but his proportion of the residue on (i) balance of the account. ‡ That this is so at law, appears from two cases, 2 *Lprd Raym.* 871. and *Heydon v. Heydon*, *Salk.* 392, where it was held, that judgment and execution against one partner for his separate debt does not put the other in a worse condition; for he must have all the allowances made him before the judgment-creditor can have the share of the other applied to him. (k) So if one partner had died, the debts and effects survived: but yet the survivor is considered in this court barely as a trustee for the representatives of the deceased; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterward: which is from the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterward dies or becomes bankrupt. So if the partnership was dissolved by consent; as in this case, that determines not the legal interest, which continues as before; so that the property in the stock of the partner so going out is not divested thereby, but he remains equally intitled as joint-tenant with the other; and in a bill for an account the stock would be subjected for his satisfaction. Then, as between one partner and the separate creditors of the other, the law and those two cases before mentioned say, that they cannot affect the stock any farther, than that partner could, whose creditors they are (1). It is objected, that all this is allowed by the rule, by which *Skip* consented to determine the partnership, and that personal security should be given; which is a waiving his property, and resorting to personal security: but that is a most strained construction, and there is nothing in the rule to import it. The price to be paid for *Skip's* share remained to be settled, and the bond for payment was never executed; *Harwood* having trifled and performed no part. It is impossible therefore to consider *Skip* as parting with his lien upon this stock by this rule, when

* These principles approved by Lord *Mansfield* in *Cowp.* 445, and induced him to rule, that assignees, under a joint commission against two parties taken out after bankruptcy of both, cannot have trover against one in possession of goods under a sale of consignment, *bona fide* for valuable consideration and without fraud, from one of the partners who was not a bankrupt, but the other had committed an act of bankruptcy.

† Where partnerships have commenced at different times upon a bankruptcy of all, the court will direct separate accounts, and that each estate shall first bear its own debts. 2 *Brown*, 15.

(i) *Cowp.* 471. 3 P. Wms. 183.

‡ 2 *Vern.* 293.

(k) *Cooke's Bank. Law*, 298.

nothing was done toward carrying it into execution. But the subsequent proceedings shew, that *Skip* insisted on it, viz. his bill, and the order was made to restrain *Harwood* from disposing of his effects; for which [243] order there would be no ground, and *Skip* been considered only as a separate creditor, and not as having a specific lien.

But the more material consideration is, whether any, and what alteration is made by these acts of bankruptcy, and the commission thereon; which shall now be taken for granted to have well issued, and to have been acts of bankruptcy, without entering into that question.

And to shew that in point of law and equity such an alteration has been, and thereby *Skip* has lost his specific lien, the clause in 21 J. 1. c. 19. is insisted on: the construction of which clause has been much controverted and argued in the case of *Ryal v. Roxles*; [*Post*, 348. 375. & 1 *Atk.* 165,] which case yet waits for the opinion of the judges; and therefore I at first doubted, whether it should not wholly stand over, till that resolution is given. But on consideration I think I can form an opinion (at least to satisfy myself) without prejudice to any question, that may arise in that case; of which this will stand clear.

First observe, that this is not a case strictly within the words of the preamble of that clause; which is a description only of goods and effects of the bankrupt himself consigned by him to another, who suffers them to be left in the possession of the bankrupt. And in *L'Apostre v. Le Plais-trier*, cited in 1 *P. Wms.* 318, it was held by *Holt*, C. J. that the enacting clause should be explained by the preamble: but my opinion shall not be founded on that. This case clearly, according to *Holt's* opinion, would not be within this clause; for *Skip's* share was his own; not being assigned by him to *Harwood*; nor within the preamble. But I will not determine a point in which such great judges differed; as Lord *Comper* did, with some warmth from *Holt*, in the case of *Copeman v. Galland*, 1 *P. Wms.* 314. nor is it necessary.

But what I found myself upon, is, that by the enacting clause to subject goods to the creditors of another person, those goods at the time of bankruptcy should be left in the possession, order or disposition of the bankrupt; so that he might take upon himself to sell or dispose as owner: and there has been no case upon this act, or ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one to the debts of another (1), without proof of the consent of the real owner to leave them in the power of the bankrupt (possession only not being sufficient) or a laches in letting them remain there, so as to gain him a false credit. The contrary of which appears here; for it is impossible to take more methods to prevent it than *Skip* did; the evidence being that that is no such implied consent, especially as there was no execution by [244] *Harwood*.

Nor do I found myself on the notion of a *lis pendens*; which, it is insisted for *Skip*, subsisted at the time of the bankruptcy by the bringing his bill, so as to be sufficient notice; which question I would not willingly determine, because there is no case, where this court has determined the property of goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels,

which might be of dangerous consequence : though as to real estate it may be otherwise.

But what I go upon is, that this case is not within the act of parliament : therefore if the question arose on the case of the mortgage of goods, or an absolute sale, and the vendor did not deliver them at the time appointed, but on *trover* against him kept the vendee at arms length, and in the mean time became bankrupt ; this would not be considered as a leaving the goods by vendee in the possession of the bankrupt within the act ; the vendee having done every thing in his power to get possession from him. So if a mortgage (which is the case of *Ryal v. Rowles*) of goods, which are contracted for, and agreed to be delivered into the party's own hands, or the key of the warehouse (which in bulky goods is all that can be done) but no such delivery is made ; and a bankruptcy follows ; *detinue* having been brought for them, they would not be considered as left in the possession of the bankrupt : the pursuit in a court of justice excluding any actual or presumed consent. Farther still : suppose a partnership determined by effluxion of time ; one intends to continue the trade, the other will not, insisting upon a division ; and on non-compliance brings an action at law, or a bill in equity for an account, and to restrain the disposing of those goods, the possession of which is wrongfully kept from him by his partner ; who pending this becomes bankrupt ; this would not be within the statute.

Skip therefore is intitled to the same specific lien against the assignees as against *Harwood*, and that even as to the new stock ; for in all those cases of a lien on a partnership, it is not considered as appropriated to the stock brought in, but to every thing coming in lieu during the continuance or after the determination of the partnership. As in *Bucknal v. Roiston*, *Pre. Chan.* 285. Where a lien was held to be on those goods, which were the produce of the original goods. So in *Brown v. Heathcote*, *Mich. T.* 1749, I held, that it continued on what was the produce by way of barter and sale ; and that holds much more strongly in the case of a partnership trade which cannot otherwise be continued. It is said, that the acts of parliament relating to bankrupts intended to level these specific liens, as they do judgments unexecuted : but that is because of the express words of the act of parliament, that judgments unexecuted should be levelled : for otherwise they would continue [245] specific liens.

Another question is between the assignee and the sisters ; in which arises a difficulty in respect of the penning of the former decree ; which could not then be foreseen ; as then no bankruptcy had taken place, and the *Harwoods* themselves were partners.

The sisters insist on two specific liens ; first by the inquisition taken by the *elegit* ; secondly by assignment to the officers of excise when the effects were seized. Upon which a very different question arises, as between the assignees and the sisters, from what it was between *Skip* and the sisters ; for as against *Skip* the sisters could only affect the share of *Harwood*, on the authority of *Heydon v. Heydon*, and 2 *Lord Raym.* 871 : it was immaterial to *Skip* to enter into the question, whether they are general creditors or not : but as the assignees can only affect a share of that share, it may be very material to them, whether the sisters have gained a preference by those two liens. And that may be influenced by the opin-

ion of the judges in *Ryal v. Rowles*: for the sisters on the *elegit* do not take possession of the goods, but leave them absolutely with the *Harwoods*. The question therefore arises, whether by this clause they are not excluded, being either a plain consent or great laches: and it holds more strongly against a creditor by execution than any other; for if a creditor by *fieri facias* seizes the goods of the debtor, and suffers them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution: it has been determined often, that it is evidence of fraud (1) in the first creditor, and the goods in the hands of the debtor remain liable. As to them therefore the point shall remain till the determination of that question.

The bill therefore must be dismissed, so far as it seeks to come upon the specific lien of *Skip*: but in justice to the assignees, the other question must be reserved: and if by the determination of *Ryal v. Rowles*, I shall think, the sisters have lost their specific lien, I may come at it by varying the former decree; considering them, instead of partners, as gaining a lien, but as having lost it by laches, and to receive a dividend as general creditors of the *Harwoods* (2).

The only difficulty objected is, that on a bill to carry a former decree into execution, the court can only do that, and not vary; and the general rule is so. But there are several instances wherein the court has considered the directions, and whether there was any mistake; as has been done by Lord *Comper*, to attain the justice of the case; and may be done here, especially as between new parties.

(1) See *Twine's case*, 3 Rep.

(2) See this point determined on the cause coming on again, post. 466.

[246]

EAST INDIA COMPANY v. CAMPBELL, June 7, 1749. *Exchequer*.

Demurrer to information as subjecting defendant to pains and penalties (1).
A demurrer may be put in after a plea is over-ruled (2).

INFORMATION was brought in the name of the *Attorney-General*, that defendant might discover how he came by the possession of certain goods? whether it was not by fraud, violence, contrivance, or other means; and whether they were not the property of the *Indians*, from whom they were so taken by the defendant and others? The defendant's share amounting to a considerable sum; the captain of one of the company's ship, on board of which he had put it, refused to deliver to him: having informed the company of the transaction, in which the defendant was said to be concerned.

The defendant put in a plea, which was over-ruled, and afterward demurred, the same in substance as his plea, to the putting in any answer: for that he cannot discover, how these goods came into his possession, because it would subject him to a fine or corporal punishment: or that if he shewed, he gained it in the way of trade, he would be liable to the penalties in the acts of parliament established for the company.

(1) See 5 Ves. 173.

(2) *Baker v. Melish*, 11 Ves. 68.

Against which it was said, two dilatories will not be suffered. The company is considered in the *East Indies* as a surety for every *Englishman*, and answerable for any damage done by them there; and as every surety may come upon his principal, has a right to be indemnified by the person, from whom the *Indians* suffered an injury, for which the company are to make satisfaction. As in the case of the crown, who must make reparation for depredations committed by the subject, but may bring an information against that subject to indemnify his country for the loss suffered. So the rule in all treaties is, that upon *letters of marque* satisfaction only equal to the injury shall be taken; if more is taken, the crown may oblige the party to refund. As these goods are not the property of any one, the crown ought to interpose by its right to take care of the interest of the public, and to prevent a failure of justice, as it does in other cases. The not venturing to deny the charges is a tacit admission. A court of equity will not indeed compel a defendant to subject himself to a penalty, unless it is waived: but here he would be subject to none by reason of the pardon in the act of grace: but suppose he had confessed it, there could be no punishment, as it could not be tried here; nor is it punishable by the statutes of [247] H. 8. as being within the jurisdiction of the *Admiralty*. Bills *quia timet* are allowed here: some of the questions he may very innocently answer, nor will any of them harm him, if he answers in the negative, as he may.

But *per tot' cur.* This is an out of the way bill, and of dangerous nature, by persons having no right, and founded on several suppositions. If any complaint had been made in the *East Indies*, and depending there, the company might be right to have this money retained till that was determined: but there being no complaint, it is to be presumed none will be. The matter if committed, is allowed to be felony, and by the *Attorney General* himself is thought to be piracy; although not so by the course of common law. Then the rule is, that this court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime: for it is not material, that, if he answers in the negative, it will be no harm: and that he is punishable appears from the case of *Omichund v. Barker*, [1 Atk. 21.] as a jurisdiction is erected in *Calcutta* for criminal facts: where he may be sent to government and tried, though not punishable here; like the case of one who was concerned in a rape in *Ireland*, and sent over there by the government to be tried, although the court of *B. R.* here refused to do it: which was founded on a case in 2 Vent. for the government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals. But this objection goes further (n); for if it only tended to render him infamous, he should not be obliged to answer: but he is also liable to be affected civilly, viz. by a prosecution by the company for carrying on an illicit trade within the limits of their jurisdiction; and this, whether he went in the company's service, or not; for though lawfully there, he might not lawfully trade there. Nor is this within the notion of two (o) dilatories: for though a demurrer is a dilatory,

(n) 1 Vern. 109. 2 Vol. 245. 1 Atk. 549. 450. 2 Atk. 393. 200. 1 Brown, 97. 3 P. Wms. 376.

(o) 2 Vol. 492.

a plea is not; being matter of justice in bar to the relief sought; * and a plea may be over-ruled, as a plea of purchase without notice for want of form, covering too much, &c. and yet it may be insisted on in the answer. But supposing it dilatory, a court of equity must not merely for form's sake be a court of inquisition to do great injustice. An exception may be allowed as to part, and over-ruled as to part: but all is here relative to one thing, viz. the method of coming by this, stated to be taken by force, violence and fraud; which, whether the defendant is obliged to answer, is the question now; and is asked by persons, who have not made out their right. For unless this is proved to be stolen, the crown has no more a right there-to than a private person. Possession *prima facie* gives property: which is in defendant, and (by *Chief Baron Parker*) the property is not in the *King* but in the proprietors; who are intitled to restitution: but whether the crown is concerned or not, may be considered at the hearing.

[248] If defendant is not obliged to answer the facts, he need not answer the circumstances, although they have not such an immediate tendency to criminate: nor should the privileges of great companies be extended farther than the trade necessarily requires, to the oppression of others.

* Double plea ordered to stand for an answer with liberty to except. 1 *Brown*, 404.

METCALF v. HERVEY, *June 9, 1749.*

Demurrer to bill of interpleader.

Affidavit to bill of *interpleader* need not swear that it is at the plaintiff's own expence.

Bill lies to discover the title of a person bringing ejectment, and to see if it is not in some other.

DEMURRER to a bill, which was founded on a rumour, that there was issue by Lady *Hanmer*; which issue was suggested to be intitled to the estate in question; and praying that if there was any such person, he might interplead with the defendant, and also praying an injunction to stay proceedings in ejectment by defendant, and to any action for mesne profits.

Two causes for demurrer were assigned. First for the insufficiency of the affidavit annexed to this bill of interpleader, in not saying it was at the plaintiff's own expence, as well as that there was no collusion with the defendant. The second, that no case was stated to intitle to any relief so as to oblige the defendant to put in an answer: that in a bill of interpleader it must be shewn, that the plaintiffs are in danger of paying rent a second time; and that such bill on demurrer will be taken strongest against the party whose bill it is.

For plaintiffs. This is not a mere bill of interpleader: it praying something further. There is another person to interplead with, although the plaintiffs cannot find him out; like the case of another defendant's being beyond sea. Where it is doubtful whether a person is dead or not, the court has compelled security to be given, if he appear not to be dead. The court has prescribed no particular form of affidavit, but in general that there is no collusion.

LORD CHANCELLOR.

This is a very particular case (*p*): but as it is a general demurrer to the whole bill, if there is any part, either as to the relief or discovery to which the defendant ought to put in an answer, the demurrer being entire, ought to be over-ruled.

As to the first cause of demurrer, there is no such rule of court; the material part of the affidavit being that the plaintiffs should swear that they did not collude with any of the defendants; whereas the requiring to swear, it is at their own expense, goes farther; and such an affidavit would require the denying it even in cases where a person [249] may bear the costs of suit without being a maintainer: as a father furnishing the expences of a suit on a bill by his son.

As to the second cause; the bill is in two lights. First, supposing it an interpleading bill: secondly, supposing it not; whether there is any other ground?

As to his being an interpleading bill, it is of the first impression; not averring that there is any such person as can interplead with the defendant; nor should I be willing to allow new inventions in bringing bills of interpleader: which might be dangerous; as they are formed in some measure as interpleader at law: in which it must be shewn to be between persons *in rerum natura*. One thing indeed occurs, viz. suppose a guardian, having the infant in his custody, conceals, and will not produce him, but sets up a title to himself; and the infant is the person suggested to have right to controvert that title; in such a case, and so charged, I will not say, but such a bill might be brought, and to compel the guardian to produce him.

But whether that be the present case or not, the ground I go on is the other part; not only praying to interplead but for an injunction; which cannot be founded on a bill of interpleader as to the ejectment: as such bill cannot be as to the possession, but must be as to the payment of some demand of money. The question comes to this; whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out, and see, whether that title be not in some other. I am of opinion, he may, to enable him to make a defence in ejectment, even considering him as a wrong doer against every body. As to the prayer for an injunction to an action to mesne profits, it appears from the case, that if there be such a child *in rerum natura*, he must be an infant, and then the plaintiffs are in a different light, than if he was of full age. None can have an action for mesne profits, unless in case of actual entry or possession; for which no pretence exists here; and every person possessing the estate of an infant after his title accrued is considered here as guardian to him.

Then even supposing the interpleading part of the bill, which I am not willing to allow, to be out of the case, and considering it as a bill for the discovery of the defendant's title to possession of the estate, and to the rents and profits (*q*); the plaintiffs are intitled to that discovery: and the defendant having demurred to the whole bill for discovery as well as relief, it ought to be over-ruled.

(*p*) If it does not go to the whole bill, the particular points demurred to, must be clearly expressed. 2 Vol. 451.

(*q*) Unless it has been tried and determined before. 1 Brown, 305.

OWEN v. GRIFFITH, *June 10, 1749.*

(Reg. Lib. 1748. B. fol. 294.)

The rule that no appeal for costs merely, not to be strictly adhered to, if a sound distinction can be made: as where a fair incumbrancer is decreed only his principal and interest. *Creditor by elegit.*

Courts of equity now make a creditor under an *elegit* account for the profits really received, and not merely according to the extended value.

APPEAL from a decree made by *Justice Abney*, sitting for the *Master of the Rolls*, for not giving costs to the defendant upon a bill brought to have an account taken, and for relief and satisfaction in the nature of a redemption of an estate, which the defendant had extended by *elegit* upon a judgment on a debt originally created by bond.

The general rule that there could not be an appeal for costs only, was insisted on: the costs were discretionary in the court, and not of right to be given to mortgagee, who may even be made to pay costs, if he misbehaves; as by insisting on an estate not to be redeemable, which appears to be redeemable.

LORD CHANCELLOR.

The defendant could only be obliged to account according to the extended value. But this court since Lord *Cowper's* time goes farther, and obliges the creditor to account for the profits really received: he is clearly intitled to his costs on the merits, if not precluded by that rule; which I have often heard so delivered by the court (r). The foundation of it was to prevent vexation and trouble; for as cases in equity often depend on abundance of circumstances, about which as the reason of mankind might differ, it would create perpetual appeals: but this is no printed rule; and it seems somewhat strict and hard to adhere to it; for since the stamp duties, costs come to be very material. Yet if it was to be laid open generally, that an appeal might be for costs, it would cause that general inconvenience, to which a particular inconvenience ought to give way. But if a sound distinction from the rule can be made, it ought to be allowed; and it will be very unfortunate if in this case the defendant should be precluded thereby; for being an incumbrancer for a just debt, and having a lien on the estate for her costs as well as her demand: it seems to be an exception, and different from the court's not suffering matters to be overruled merely for costs. Besides here the appeal for costs affected the merits of the case, the justice of which is on the defendant's side; not being over-paid, or having made a bad defence; in which case she might be even made to pay costs. Nor was she in any default in not delivering possession, even after she was quite paid; for till her costs were paid, as well as principal and interest, an incumbrancer is not bound to deliver possession; the estate being as much a security for one as the other.

(r) This doctrine affirmed by Lord *Thurlow*, in 1 *Brown*, 143, where he held there should be no appeal or rehearing for costs only, unless upon an apparent mistake.

Let the defendant therefore have his costs taxed (1).

(1) So much of the decree was reversed as directed a sum of £93. 11s. 6d. reported due from the defendant to be paid into the bank, and that the defendant should deliver possession of the estate in question, and that no costs should be paid as between the plaintiff and defendant. And it was referred back to the master to take an account of the rents, &c. subsequent to the master's report received by the defendant, &c. And what should be so found due was to be added to the said sum of £93. 11s. 6d. reported due, &c. and the master was to tax the defendant her costs; and in case what should be found due to the defendant for her costs should be less than what should be reported due on the said account of rents, &c. the costs were to be deducted thereout, and the surplus paid into court. But in case the costs should exceed the same, the defendant was to deliver up possession on receiving payment of the surplus of such costs, and acknowledge satisfaction on the judgment obtained at law at the expense of the plaintiff. But in default of such payment, &c. the bill was to stand dismissed with costs. Reg. Lib.

ROBINSON v. GEE, June 10, 1749.

[251]

(Reg. Lib. 1748. B. fol. 522. entered "*Robinson v. Osgood*.")

Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. Parol evidence of an agreement between the parties deemed inadmissible. Bond *ex turpi causa* delivered up (1).

SAMUEL GEE, tenant in tail, remainder over to his brother *Osgood Gee* in tail (s), with other remainders, wanting to raise money for the payment of debts on his estate, proposed to *Osgood* to join in a mortgage for £1000, which was done; and both joined in a bond: but *Samuel* being first named he received the money.

The remainder being vested and attached in possession in *Osgood* upon the death of *Samuel*, the creditors of *Samuel* brought this bill to turn the mortgage debt and interest on the real estate of *Osgood*, and to exonerate the personal estate of *Samuel*; which it was argued for the plaintiffs was the true intent and result of the transaction between *Samuel* and his brother in all events: and that *Osgood* joined in this manner to preserve his remainder in tail, which *Samuel* would otherwise have destroyed by recovery; comparing it to the case of an elder son preventing his father from suffering a recovery by promising to make good the provisions, he thereby intended for younger children. But farther, that there was evidence of a particular agreement for this purpose between the brothers, that this debt should be entirely on the estate of *Osgood*.

This was objected to, as not being proper evidence within the statutes of *frauds*, because only *Parol*: whereas this being a real right annexed to a real estate, such an agreement could not be proved without writing.

Against this was cited for plaintiffs *Walker v. Walker* (1), December

(s) 1 P. Wms. 291. 2 Salk. 449. 1 Vern. 36. 3 P. Wms. 359. 2 Atk. 436. Ante, 52. Post, 312.

(1) See *Priest v. Parrot*, 2 vol. 160.

(1) 2 Atk. 98, 100.

1740, where *John Walker* having two brothers, surrendered a copyhold estate to one, charged with an annuity to the other. A question arising concerning the right of the parties upon the refusal of payment of the annuity, by the surrenderee: it was contended, that notwithstanding the surrender imported on the face of it to be a surrender of the legal estate subject to the payment of the annuity, yet was it in the view of the parties that the annuitant should surrender a copyhold estate, which he was possessed of, for the former surrenderee's son; the only evidence of which was by parol: and that his *Lordship* held it proper.

[252] LORD CHANCELLOR.

The question depends on two considerations; first, on the nature and circumstances of the transaction in general, abstracted from the evidence of a particular agreement; and as to that, the whole of the proposal to *Osgood* was to join in the mortgage, not that he should make his estate liable. Suppose, this had been the real estate of *Samuel* alone of which he was seised in fee; nothing results thereout to exonerate the personal estate of *Samuel*, and to prevent the devisee of the real estate, or the heir, from having the personal in exoneration of their estate. The general rule is, that where there is a mortgage of land, with covenant for payment of the money, that is a debt on the personal assets, to be applied first in exoneration (1). Indeed simple contract creditors and legatees will be intitled to come upon the mortgaged premises *pro tanto*, if exhausted: but executor or residuary legatee could not be intitled to stand in the place of mortgagee for so much as was drawn out of the personal estate, as pecuniary creditors or legatees might. Suppose the heir at law of *Samuel* (which in this case was not *Osgood*, but a child of an elder brother) had joined in the mortgage as surety for the person borrowing the money, and had no benefit from it, which all went to his ancestors; he would notwithstanding his joining be intitled to have the personal estate to exonerate the real: but this is a mortgage of a divided estate. Taking it in general; if it appears that *Osgood* joined only as surety for his brother, and pledged his remainder: that is, turned it into a base fee, merely as a surety, there is no colour to say, the personal estate of *Samuel* should be exonerated; for that would be to say, the estate of the surety should exonerate the estate of the principal debtor; for which indeed it must be a very strong case. If that was the case, the equity of *Osgood* would be to have this debt by specialty discharged out of the estate of *Samuel* against every body. Nor could the creditors or legatees of *Samuel* say against that; standing in the place of their debtor; or have recourse back against his surety to have his own estate exonerated, which the debtor himself could not have. It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband: after the husband's death she is intitled to have her real estate exonerated out of the personal and real assets of the husband; the court considering her estate only as a surety for his debt; and none of his creditors have a right to stand in place of the mortgagee to come round on the wife's estate. Had there been evidence, that *Samuel* intended to alter the succession, and bar his brother, it would have great weight; but there is none such: he wanted to make an effectual mortgage to induce

the mortgagee to lend money, and then was satisfied; which distinguishes it from the case of an elder son preventing a recovery by his father; as that is a fraud, and the intent not wholly answered, as it is here. But *Osgood* had no consideration; nor was *Samuel* deprived of his liberty of suffering a recovery; for it was now settled (though formerly doubted) that notwithstanding tenant in tail, has turned his estate into a base fee, he may by a recovery bar this in tail, on the rule of this court as to recoveries in equity, that a person having the redemption remains in actual possession: so that *Osgood* had no benefit by it. Suppose an action brought on the bond or covenant in the mortgage against *Samuel* by the mortgagee, and judgment ensued; *Samuel* could not in his life come into this court against *Osgood* to indemnify himself against this demand; for that would be a strange bill, that he should come against his surety, who had lent his estate. Then if he could not, none in his place could. Suppose the mortgagee had brought an action upon the bond against *Osgood* alone, and got judgment: as he might, the bond being joint and several: *Osgood* might have brought a bill against *Samuel* as principal, and would have relief although no counter bond, and stand in the place of the creditor, and is then intitled to that relief after his death.

The second consideration is, whether there is any particular agreement to turn this debt entirely on the estate of *Osgood*? As to the parol evidence, it is not necessary to give an absolute opinion, but I doubt whether it would be good. This is certainly a kind of real right; being to affect a real estate in all events, contrary to the writing, and to rebut the equity. Before the case of *Brown v. Selwin*, [Cas. Talb. 240.] it was held in several cases, that parol evidence might be given to rebut an equity, although relating to a real right; but in that, which was a case of a will, the *Lords* held otherwise. From which determination, going further than ever before, I did indeed differ in opinion: the equity there was, that two persons were made executors and residuary legatees; one of them being a debtor, insisted his debt was thereby extinguished; the other insisting on the contrary, *Selwin* offered parol proof of being made an executor with intent to extinguish that debt; which the *Lords* would not suffer to be read; and that is a stronger case than the present. As to *Walker v. Walker*, the facts are, as have been cited; but the ground I went upon, was, that it was evidence of fraud against the defendant who was to be charged therewith: and no one can protect himself by the statute in a fraud: but supposing it might be read, it is not sufficient to prove what it is brought for. It is strange, that *Osgood* should on so precarious a chance take this debt entirely on himself, when *Samuel* might still suffer a recovery: and taking the evidence in its greatest extent, the weight thereof is taken off and contradicted by the evidence on the other side; by which it is plain, that *Samuel* was taken both by himself and *Osgood* to be the debtor. So that the facts subsequent and concomitant speak the contrary to any actual agreement to this purpose: this is therefore an at- [254] tempt by persons standing in the place of the principal, to turn the estate of the surety to exonerate the debt of the principal.

Another question was, whether the plaintiffs were intitled to be relieved against an assignment and bill of sale of goods made by *Samuel* in trust and for the benefit of one *Mrs. Hanks*, by having it set aside: and

also to have a bond postponed given by *Samuel* upon articles, which imported a direct assignment by the husband of his wife *Mrs. Hanks* (who was herself a party) to the use of *Samuel*, with covenant for quiet enjoyment, and further assurance, the consideration-money being £10, *Samuel* having also by a clause in his will left the same sum, goods, &c. to her.

LORD CHANCELLOR.

As to this question, if it can be called so, of the demands of *Mrs. Hanks*: it is an extraordinary case, and such as, I hope never will be again; it is a direct assignment of his wife, and is a scandalous prostitution of the law; for the bond looks as if drawn by a lawyer. Although the court in some cases will not set aside such bonds; as in the case of young girls, where it is *præsumptum pudicitie*, this is a bond (u) *ex turpi causa*, and is infected with the turpitude of the articles; so that as to the creditors, it must be set aside: as must also the assignment and bill of sale; which are infected with the infirmity of the consideration: and had it rested on the bond, I should not doubt to set it aside in respect to the residuary legatee. But as the will is to the same effect, it is more doubtful: for a legacy may be given, and not be infected with the turpitude of the bond: and then his residuary legatee cannot controvert or oppose his will. But it is proper to reserve the consideration of this till it is seen, whether the personal estate is sufficient to pay the debts.

It was urged, that a specific legatee, where the testator has no power to dispose of it, cannot come against residuary legatee for a satisfaction out of the rest: and *Mrs. Hanks* is a specific legatee, and cannot come at it because of the turpitude of the contract.

LORD CHANCELLOR.

True; but I will reserve it as between the executor and her.

* Dismiss the bill, so far as it seeks to charge the estate, comprised in the mortgage, come to *Osgood* in favour of the assets of *Samuel*.

And let the bond, appearing to have been for undue consideration, be set aside, and also the bill of sale (1).

(u) 1 Brown, 38. 149. 2 Vol. 549. Post, 276, 277, 503. Salk. 156. 2 Vern. 322, 588, 652.

* Vide 1 P. Wms. 4th edit. 294. note 1, where all the cases are collected to shew that the personal estate shall be principally applied in discharge of testator's personal debts, unless he expressly exempts it by words or manifest intention: *secus* where the charge is on the real estate principally.

(1) And the defendant, *Mrs. Hanks*, was ordered to pay the costs of the suit, so far as related to these matters and the assignment, R. L.

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DOOR v. GEARY, June 12, 1749.

(Reg. Lib. 1748. A. fol. 434.)

Legacy of stock, erroneous description (1). Satisfaction. Husband devises to his wife £700 *East India Stock*, having none; but there was £700 Bank stock, to the surplus of which the wife was intitled as an executrix after payment of her testator's debts; and which the husband afterward transferred in his own name. The £700 Bank stock shall go to his wife, being an erroneous description.

A MAN upon his marriage binds himself to leave his wife £500 by his

(1) See 1 Atk. 435. 2 Rep. on Leg. 319, &c.; also 3 Ves. 306.

will: he leaves her the interest of his personal estate during her widowhood; and leaves her £700 capital *East India stock*, in which he was then interested, possessed of or intitled unto, to be disposed of by her as she should think fit. He had then no *East India stock*; but there was £700 Bank stock, to which his wife was intitled in *auter droit* as executrix to another after the debts of her testator paid, and which the husband afterward transferred in his own name.

For plaintiffs, representatives of the wife. There was a plain intent to pass stock of some kind; no technical words are required in wills to describe the thing or person: and the court will construe, transpose, or leave out words to effectuate deeds or wills. This cannot indeed be taken as a general devise of £700 *East India stock*, so as to be made up out of the testator's estate. But a person may take a devise though wrongly described: as in a devise to nephew *Dew*, where the name was *New*. This at most is but a mistake in the description of the thing, and within the rule of a mistake in the person, not an error in substance: of which kind there are several cases in *Swinb.* of error in the quality of the devise, when the substance is certain; so in *Godolph. 285, &c.* and *Brownlow, 131, Pacy v. Knolls, 1 Jo. 379, Cr. C. 447, 473,* and in *Beaumont v. Fell, 2 P. Wms. 141*, the intent appearing, a mistake in both christian and surname did not make it void: courts have gone great lengths in this. A devise of all lands in a place having only tithes there; they passed, *Rol. Ab.* and although the quantity of the stock now differs from £700, that was the sum at making the will; nor had he stock in any other company.

For defendant, executor and residuary legatee. The question is, whether the testator intended this specific sum of Bank stock with sufficient certainty? For then error will not hurt: the court even letting in parol evidence to shew the intent. In all the cases cited the testator had the thing given at the time; which the court always considers in the devise of a specific thing; for if the testator had it not, it is void, and the executor shall not be obliged to make it good. Here the testator had no *East India stock*; nor properly any Bank stock; being intitled to it in the name of his wife, and his taking a transfer of it in his own name after his will, shews he meant it should go as his own estate.

LORD CHANCELLOR.

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This devise is sufficient to carry the £700 Bank stock to the wife under the circumstances of the case. The question is, whether it is absolutely void, or a bequest of something, but erroneous in the description? It amounts only to the latter; in which case, it is admitted for the defendant, it will not avoid the legacy. In the construction of wills, the testator must be taken to mean something, if it can: nor must the words of a will be void, if they can have effect by reasonable construction: it is rightly admitted for the plaintiffs, that it cannot be brought within the rule of *Pierce v. Snaveling, [1 Atk. 414.]* which was a devise of money, so as to make it up out of the testator's estate (1). Supposing the testator had this stock in his own name, having no other; it would undoubtedly pass, being only *error demonstrationis*, and the words *East India* should be rejected. Why this is a greater mistake than the devise of a black, having only a white horse; where the word *black* should be rejected? So in *Pacy v. Knolls (2)*, and in other cases: I will not mention cases of mistake

(1) 1 Atk. 414.

(2) Cro. Car. 447, 473, and 1 Jon. 379.

in the names of legatees, where it could be reduced to certainty; although I do not know much difference in error in the description of the person of the legatee or of the thing. The present testator had an interest in right of his wife, in this surplus of debts of her testator; which if he had sold for valuable consideration, and died in the life of his wife, it would be good; like the husband's right over a term of his wife: so that though it is true, if the wife survived, she would be intitled to it, yet the husband had an interest in it, which he might convey, and it would bind the wife after his death. This case is the stronger by reason of the obligation he was under by bond to make provision for her; having left nothing else absolutely which can be applied to the performance of the condition, except that precarious chance during widowhood, which cannot be so applied. The plaintiffs therefore are intitled to have the dividends arising from this legacy from the husband's death.

WHITMEL v. FARREL, *June 22, 1749.*

(Reg. Lib. 1748. B. fol. 538.)

In agreements no relief in equity where an action at law would not lie by reason of a substantial defect; such as a contingency not happening.

Husband covenants in marriage articles, in six months after death of his mother, and that he should come to and be in possession of the estate in jointure, to settle, &c. He dies in mother's life, leaving no issue. The estate comes to his heir; who shall not be compelled by the wife to a specific performance.

JOHN HERBERT DODD, at the time of his marriage, having an estate of £300 *per ann.* in possession, and a leasehold estate, out of both which he could make a provision for a wife; and also an estate tail after the jointure of his mother determined, settles £500 part of her portion in trust for the wife and issue of the marriage, and also the leasehold for the benefit of the wife for life, in bar of dower, not carrying it to the issue. He then takes up the consideration of the additional portion of the wife by her father; and covenants, that within six months after the [257] death of his mother and, that he should come to and be in possession of the estate so in jointure, he, his heirs and assigns, should settle so much of the estate, as amounted to £100 *per ann.* upon her for life, then to the issue of her marriage, and for the want of such issue to his heirs (1).

He died in his mother's life, leaving no issue, and the estate came to his sister.

That the plaintiff, notwithstanding he died in the mother's life, was intitled to compel the heir to make this settlement; it was urged, that wherever one agrees to do a thing within a limited time, his heir, who is the same as himself, is bound to do it, the court considering the substance; not that the party himself should do it; and that the words *and that he should come into possession*, amount only to a recital of what went before; such recitals being usual.

(1) It was likewise stated as part of the consideration, "that the assignment of the lease should cease, and remain at the husband's disposal from the making of the settlement." R. L.

LORD CHANCELLOR.

'This is not quite clear of doubt; but on the whole, I am of opinion, that the plaintiff is not intitled to have a specific performance of the articles: it is not the case of a wife left without any provision made for her under the articles upon the marriage agreement. It is not expressed to be by way of jointure; because it would not answer the purposes of a jointure, as the mother might survive and interpose. The intent was for what the wife brought in present, to secure a certain settlement of £500, and the leasehold: but as to any additional portion she was to take her chance: it being uncertain on the other side, what that addition would be. The material question is of the construction of the articles.

First, to consider what would be the construction in a court of law; and whether an action of covenant, in the fact that has happened, could be maintained thereon? and I think not; there being two contingencies, (for it is improper to call them conditions) upon which the obligation to perform this covenant was to arise; but one of which has happened: for though the mother is dead, he never came into possession; and in action of covenant against the heir at law or executor, it must be alleged, in order to assign a breach, that he came into possession after the mother's death; which if it cannot be done, the action cannot be maintained.

Then to consider what construction it will bear in equity: whether a specific performance according to the plaintiff's exposition? There are few cases in which a court of equity will decree a per- [258] formance of a covenant or agreement upon which there can be no action at law, according to the words of the articles and the events that have happened. This court indeed will carry several agreements into execution, upon which an action at law cannot be maintained by reason of the form of the instrument; but rarely where the covenant was not performed by reason of the events; in which case the same construction must be here as at law. I will not say, that upon a marriage agreement imperfectly drawn by the parties, and not reduced into proper form, a court of equity will not make a liberal construction of the words, to find a provision for a wife or children. But here it is regularly drawn; and this court must not put a different construction from what the law would do. Nor is the plaintiff's construction the intent.

Dismiss the bill therefore, so far as it seeks a specific performance.

KIRKHAM v. SMITH, June 23, 1749.

(Reg. Lib. 1748. A. fol. 612.)

S. C. ante, 518.—Tenant in tail pays off an incumbrance, but takes no assignment: the remainder over, under the circumstances, subject to pay it to his representatives (1).
Election—Contribution (2).

Tenant in tail subject to an incumbrance, suffers a recovery of part, sells part, and exchanges part: the land taken in exchange not subject to a contribution of the incumbrance, the whole of which must be borne by the remainder.

(a) HUGH SMITH becoming tenant in tail under the will of his father

(a) In 1 Brown, 218, Lord *Thurlow* held, on the authority of this case and *Amesbury* and

(1) See *Amesbury v. Brown*, Post, 477.

(2) See 9 Ves. 37.

Erasmus upon the death of his two brothers, the last of whom had suffered a recovery of part of the estate and exchanged part, in 1738 pays of £5800, a debt originally upon the estate by a mortgage term for years, but does not take care to have an assignment of the term to himself: and apprehending himself to be owner, and to have power to dispose of his estate, and having two daughters, in 1741 for natural love and affection to them and his wife, by lease and release makes a settlement of his whole real estate, including and particularly describing this, thereby first limiting it to his own daughters and their issue, remainder over to the same collateral branches as under his father's entail. At the same time he makes a will of the same date in presence of the same witnesses, taking notice of his settlement and referring to it; and thereby gives legacies to the plaintiffs, directing that his wife should live at his mansion-house at *Weald Hall* in *Essex* with his daughters, and have the use of the furniture, which should be farther enjoyed by the persons, who should have the mansion-house, as limited by the settlement.

He died in 1744, leaving his wife and the two daughters.

The plaintiffs claimed this estate under the remainder in the will of *Erasmus*, as not barred; and claimed it discharged of the £5800 incumbrance, as there was a strong presumption, that it was not paid off out of *Hugh's* own money, but out of the assets of *Erasmus*; there being a direct representation of executors; so that it should not now be a [259] subsisting charge for the benefit of the personal representatives of *Hugh*. Nor will the plaintiffs by their claims of this real estate be defeated of their legacies in the will of *Hugh*; the cases, of not disputing one part of the will when taking by the other, not extending to this. 2 *P. Wms.* 616, and other cases on the head of satisfaction.

Against this it was argued, that the £5800, still subsisted as a charge for the personal representatives of *Hugh*; for whom from the time of payment they should be considered as trustees, whether there was an assignment or not. Nor does the court in general favour mergers or extinguishment, because it might prejudice families. In *Walpole v. Lord Conway*, (1), *August*, 1740, *Lord Conway* made a settlement of his estate, in which £5000, part of his wife's portion was agreed to be laid out in land, and settled after his own and his wife's death, for such of the children of the marriage, as they should appoint: in default of appointment to the younger children in tail equally: no direct appointment was ever made: nor was it ever laid out in land; but by his will, he gave his daughters £6000 a-piece, saying, that, as £5000 part of the wife's portion was not paid, he believed his personal estate would be more than sufficient to pay his debts and legacies. Upon a bill by the trustees, his *Lordship* held, that the testator considering this £5000 as part of the personal estate, although it was not so, nor capable of being disposed of by him for debts and legacies, the daughters should not claim their £6000 under the will, unless

Brown, Post, 477, that tenant in tail paying off an incumbrance is only inference, not *juris positivi*, that he meant to exonerate the estate, and evidence may be produced to prove the contrary. The rule of law is where tenant for life pays off an incumbrance, he shall be a creditor for the money, but where tenant in tail pays, it is in exoneration of the estate of which he may make himself absolute owner. 1 *Brown*, 206.

they gave up their interest in the £5000, under the settlement; but here is much stronger proof of *Hugh's* considering this as his estate. In *Cowper v. Scot*, February 1731. [3 P. Wms. 119.] it was held, that a daughter of a freeman of *London* could not claim £1500, charged by the father's will on real estate and also under the custom: it appearing from the whole context (although by implication only) that the testator intended to exclude the custom, though it was not said so. In *Ingraham v. Ingraham* (1), December, 1740, a father having power by marriage settlement of appointing copyhold estate among his children, directs by his will, that it should be divided in such proportion as the wife should think proper, who appoints by will. It was held, that the father could not delegate that power; yet any, who would defeat what the mother had done, by what was in truth no power, should have no benefit under the father's will, which shews the extent of the rule.

LORD CHANCELLOR.

It is mischievous in general, that such sort of incumbrances should be set up for the benefit of the personal estate; therefore there must be other equitable circumstances. There being a term for years in the [260] mortgagee, which stands in point of law, as it did before, as no assignment, none of the parties before the court have the legal estate, for a conveyance of which the plaintiffs come; and that conveyance must be upon equitable grounds. So far as it appears, *Hugh* paid it off with his own money; for he might have taken an assignment of the term either in trust to attend the inheritance, which would have ended this question, or in trust for himself, his executors or administrators; which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate, and those intitled thereto: or he might in his life have called for an assignment of it, if he found out this limitation in remainder, that it might be made for the benefit of his executors, not of the remainder. But his not doing any of these, clearly proves, he took himself to have the absolute ownership and disposal of it: and although he has made use of such an instrument as lease and release, (which though it has been thrown out that it will bar an equitable intail, yet it was never so determined, and I hope never will): yet the court cannot decree to persons claiming this in contradiction to his apprehension and intent, not only a conveyance of the inheritance, but also of this term without making a satisfaction to the personal estate of *Hugh*; which would be contrary to the maxim, that he, who would have equity, must do equity; and these are the equitable circumstances.

As to the other question of the legacies, these principles are admitted; that according to *Noys v. Mordaunt* (2), where one taking himself to be absolute owner of an estate, when he was not so, devised it away, and gives an estate, whereof he was absolute owner, to the person claiming a remainder in tail in the other estate devised away; the court will not suffer that person to have both estates by claiming in contradiction to the will in another part. That was in respect of real estate; subsequent cases have gone farther, and was first established by Lord *Talbot* in the case of

(1) 2 Atk. 88.

(2) 2 Vern. 581. Prec. Ch. 265. Gilb. Eq. Rep. 2. Vide 2 Rep. on Leg. 404.

a personal legacy, in *Vincent v. Vincent*, which has been since followed ; as on a devise to a younger son, of lands intailed, and a legacy to the elder, the elder shall not claim the legacy and defeat the devisee, but shall make his election : and his holds, whether the persons are children or not. This indeed is not the same case in specie and form, being a middle case ; but falls within the same reason. Here the real estate is by settlement : but this settlement and will under the circumstances of the case are to be taken as one entire disposition, and both are revocable ; but it goes farther ; for by the will he has made a disposition of part of the real estate, which, if to take place, will break in upon the plaintiff's remainder in tail, viz. the devisee of the benefit of the house to the wife : and the will is a

continuance of the intent declared in the settlement. So that [261] the claim of this real estate in contradiction to the will comes strongly within the reason of all those cases ; coming up to *Walpole v. Lord Conway* ; which was determined by me on foundation of an implication in the will of the testator's apprehension of that part of his wife's portion being part of his personal estate. But the cases upon the head of satisfaction are quite on another principle. If indeed a foundation can be laid for an inquiry, whether this money paid arose out of the estate of *Erasmus*, it would be another case ; but I cannot presume any part of the personal estate of *Erasmus* come into the hands of *Hugh*, who come in as executor by substitution, and does not appear to have proved the will : no such evidence being laid before me. And then taking it to be paid out of *Hugh's* own money, there is no colour for the plaintiff's coming into equity to have the benefit of it.

A question then arose of contribution : the brother having sold that part of the estate, of which he had suffered a recovery ; the purchaser of which was to enjoy it free from incumbrance ; it was insisted for the defendant, that the remaining part of the estate should bear the whole burthen of this incumbrance. For the plaintiffs it was insisted, the estate taken in exchange for the other part conveyed by the brother should bear its proposition ; and that *Hugh*, coming in lieu of the incumbrance, must be considered as having so much of the money in his hands.

LORD CHANCELLOR.

There is something particular in this question : but I think, there is no sufficient ground for contribution (1) ; which would be making the consideration taken by the brother for that part of the estate exchanged, liable in the hands of those standing in his place for part of the incumbrance : whereas the equity is the same, as if the brother had conveyed it to a purchaser in consideration of money paid, instead of taking land to himself in fee. In which case, there is no ground for *Hugh* to come for a proportion against the assets of his brother, who might have barred the whole. Then the equity for the plaintiff's is not better than that of *Hugh* would have been : though in respect of the mortgagee he would have a right to have both parts of the estate liable for his satisfaction ; yet on a bill by him for foreclosure or sale, the equity would be that the estate purchased should not be liable, unless the other part was not sufficient for the satisfaction.

The plaintiffs therefore are intitled under the will of the farther to so

(1) See *Lloyd v. Jones*, 9 Ves. 37.

much of the estate as was not conveyed by the brother, subject to £5800 paid by *Hugh*. But as their claim is in contradiction to the will of *Hugh* they must wave their legacies therein, and let the bill be dismissed, so far as it demands them. But no costs on either side; for though naturally the costs follow the redemption the right to redeem has been disputed, and it was a doubtful question.

GRAHAM v GRAHAM, June 26, 1749.

(Reg. Lib. 1748. A. fol. 678.)

Dower.—Satisfaction—Court in taking general accounts, making an allowance to widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them. If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either. *Contra*, where he is not a general debtor for both.

THE plaintiff trustee for her son coming into possession of the estate, whereof she was dowable, was in receipt of the profits; and, being now to account, claimed an allowance for the profits of her dower.

Objected, that though she might be intitled thereto under the head of just allowance in the account; yet as to the future profits, she had no right to come into equity for them, but should prosecute her writ of dower.

LORD CHANCELLOR.

I can not deny the plaintiff an allowance on taking the account, of so much of the profits as she had a clear right to for her dower: and then as to the subsequent time, it would be strange, if the court should decree part of possession and not secure it for the future; which would blow both hot and cold; denying her right on one hand, and granting it on the other.

The plaintiff's next claim was of three annuities given by her husband's father: the first a grant by deed of £10 *per annum* for a term of ninety-nine years, on condition that she maintained her son, and was charged on a particular estate; the second question, of £6 *per annum* during her widowhood, given by bond; the third by his will of £10 *per annum* charged generally.

The last was insisted to be a satisfaction, the court leaning against double provisions. *Brown v. Dawson*, 2 Vern. 498, and *Atkinson v. Atkinson*, Feb. 19, 1732, where a son having assets of his father sufficient to answer an annuity, by his will gave an equivalent: and it was held a satisfaction by Sir *Joseph Jekyl*. But however the plaintiff is not intitled to come into equity to recover the arrears of that annuity against a purchaser for valuable consideration without notice.

[263]

LORD CHANCELLOR.

(a) The question is, whether the latter annuity can be considered as a

(a) Post. 519. Prec. Chan. 236. 2 Vern. 478. 1 Eq. Ab. 205. 1 P. Wms. 408, 2 P. Wms. 343. 553. 2 Atk. 300, 491. 3 Atk. 96. 1 Atk. 426. The cases as to satisfaction respect relations and strangers.

satisfaction for either of the other two granted in his life. For both together, amounting to £16 *per annum*, that being but £10 *per annum* cannot be satisfaction: nor can it be for the £10 annuity granted by deed; although there are several cases in which the court leans against double provisions on the foot of parity between them. Though it is voluntary in respect of his grandson, it is not so in respect of his daughter-in-law: who by agreement to maintain her infant son for it, otherwise to cease, is considered as a purchaser; and the grandson would have a right to come into equity by *prochein amy* for maintenance thereout. Another objection to its being a satisfaction is, because out of different funds; the first being out of a particular estate, the latter charged on the general fund of real and personal. But as to what is last said, I am doubtful: and rather think, she cannot come into equity; because this does not come by way of allowance out of any thing, for which she was to account, (for if so, and she had a right to it, she must have that allowance, whether against a purchaser for valuable consideration or not:) now this was a bill originally for satisfaction of arrears and growing payments; and then the rule, which must take place, unless the plaintiff can distinguish it, is, that a purchaser for valuable consideration without notice shall not be hurt in equity, but the remedy must be at law (1).

As to the £6 annuity, which was nothing but a debt on his estate, I think, the last will be a satisfaction for it: for the person so indebted gives by his will a better annuity; which falls within all the rules established of satisfactions. If it was a bond for payment of a gross sum, and he gave an equal or larger sum by his will, it would certainly be a satisfaction. I do believe the intent was, as has been said for the plaintiff, to increase his bounty: and he has done it, by giving an additional £10 *per ann.* to the first £10. As to what was further said, (that the court will not hold what is given by a will, a satisfaction for either, where several things are given before) there might be a great deal in it; and therefore if he was chargeable with two, and devised an annuity equal to one, I should not have thought it a satisfaction for either; but it should accumulate. But he was not a general debtor for both, only for the £6 annuity: having granted the £10 annuity by way of charge on a particular estate, and really for the benefit of the grandson: so that he was debtor only for the other; and having given a higher, it cannot be distinguished from the cases of satisfaction.

(1) "And it appearing that the lands and premises charged with the payment of the said annuity of £10 a year, which was granted by the said deed of the 20th of May, 1720, and afterwards settled by the said W. G. in his life time for a valuable consideration on the marriage of W. G. his second son, without notice of the said grant of the said annuity of £10 a year, and consequently that the said lands and premises ought to be exonerated therefrom and indemnified against the same out of the real and personal estate of the said W. G. in the first place out of the personal estate, and then out of the rents and profits of the real estate of the said W. G." The master was directed to make an allowance in the accounts to the plaintiff for the arrears of the said annuity from the death of the said W. G. the grandfather. &c. &c. Reg. Lib.

ASTON v. ASTON, June 26. 1749.

(Reg. Lib. 1748. A. fol. 702.)

The court will restrain tenants for life *without impeachment of waste to a reasonable exercise of their right.*

Owner of a charge not to be presumed to have released it by permitting it to run largely into arrear; nor without proof, to be suspected of so doing to prejudice those in remainder.

Owner of a charge on an estate lets it run in arrear eight years; not to be presumed absolutely released, or intended to prejudice the remainder.

(a) SIR THOMAS ASTON in the same settlement, in which he makes himself tenant for life without impeachment for waste, with full liberty to commit waste, settles a jointure upon his wife for life without impeachment of waste.

On settling another part, he creates a term on a trust to secure a rent-charge of £300 *per ann.* to his wife, as a further part to her jointure, and afterward out of the rents and profits thereof to raise money from time to time, to reimburse her expences in sustaining and repairing her jointure estate.

After his death she, having this charge on the estate of her son, lets this annuity together with the interest of £3100, given her by her husband's will, run in arrear for three years. Upon her son's marriage she gave up the said arrear due, and also £2000 which he owed her, because he could not otherwise make a jointure within the settlement. She saw him but twice afterward: he goes abroad: and there is an arrear of eight years during his life.

Upon his dying without issue the estate came to his sister *Catherine*; who brought this bill against her mother *Lady Aston* to enjoin her from committing farther spoil and destruction upon her jointure estate: and for satisfaction for the damage already done thereby; suggesting that she had cut down even such timber as was not fit for repairs, as young saplings, &c. not leaving a twig on the estate: and also to be quieted in the enjoyment of the lands free from the arrear incurred in her brother's life.

LORD CHANCELLOR.

The questions before the court are of that nature, as depend more on the latitude of discretion of a court of equity than many other cases; and therefore more difficult for a judge to satisfy himself in the determination he is to give: which is to arise on the circumstances of the case, than in other cases, where he might be guided by particular rules. Yet the court must go by some rule, and not make such a determination relating to property, especially real property, as may be attended with inconvenience and uncertainty.

As to the first question, of the waste, consider it as it may in general concern tenant for life, without impeachment of waste under a settle-

(a) 2 Eq. Ab. 758. 2 Vern. 523. 2 Vern. 738. 1 P. Wms. 528. 3 P. Wms. 267. 3 Atk. 215. Post, 524. 546. Where tenant for life with liberty to cut timber for her own use at seasonable times, was restrained from cutting saplings not proper to be cut as timber. In 2 Brown, 88, injunction for waste granted against tenant for life without impeachment of waste.

ment; for though this is a particular case, the consideration of the general, will give light therein.

[265] It is usual in marriage-settlements to make the father tenant for life without impeachment of waste; and sometimes the words *with full liberty to commit waste*, are added, as here, to the husband's estate. But then it is most usual to insert restrictions, as *except in houses, &c.* So in making grandfather tenant for life in voluntary settlements and devises; so of father, owner of the estate, and making the settlement. This therefore may concern all such persons, and the question is, what a court of equity would do, if it arose against persons in those circumstances? At common law, that clause, *without impeachment of waste*, only exempted tenant for life from the penalty of the statute, the recovery of treble value and place wasted; not giving the property of the thing wasted: but in *Lewis Bowle's* case, 11 Co. 79, it was determined, that these words also gave the property: the necessary consequence of which was, that in general, unless on particular circumstances, he was not to be restrained in equity; for that would be to determine, that he should not make use of that property the law allowed him. But afterward several instances were considered, in which this very large power might be exercised contrary to conscience, and in an unreasonable manner by tenant for life; as where his act was to the destruction of the thing settled; which was the ground of Lord *Barnard's* case (1), the strongest that could happen: yet that was not an original case, without precedent or judicial opinion to support it: as appears from a case 5 J. 1. (before *Lewis Bowle's* case) which probably occurred then; though the determination there did not operate on it. If tenant for life without impeachment of waste pulled down farm-houses, in general I should no more scruple restraining him, than I should from pulling down the mansion-house, (unless where he pulled down two to make into one in order to bear the burthen but of one;) it tending equally to the destruction of the thing settled. If therefore he should grub up a wood settled, so as to destroy the wood absolutely, I should restrain him; which is the meaning of the words in that case, 5 J. 1. viz. *such voluntary, malicious, intended waste*: and in *Abraham v. Bubb* (2), Pas. 1680. (said to be in a manuscript of Lord *Nottingham's* collection, which I believe, I have also seen,) it is termed *extravagant and humoursome waste*. So in 2 C. C. 32, where the Lord Chancellor declares, he would stop the pulling down houses in the case of tenant in tail *apres possibility, &c.* which is carrying it a good way; as he has power to commit waste, because the inheritance once was in him: and also in the case of tenant for life by express grant. So in (b) *Cooke v. Whaley, Eq. Ab.* 400. Since Lord *Barnard's* case I have gone farther, and restrained the taking down trees for ornament and shelter to the house: as in the case of *Packington v. Layton* (3), and other cases: but a little farther still in Sir *Francis Charlton's* case: who was restrained from cutting down timber growing in an avenue and planted

(b) Prec. Ch. 454. S. C.

(1) 1 Salk. 161. 2 Vern. 738. Prec. Chan. 454. See 1 P. W. 527.; and 3 P. W. 267. 5th edit.

(2) 2 Freem. 55. 2 Sho. 69.

(3) 2 Atk. 216.

walk in a park; but it depended on the same principle; and though there was a lane between the house and park, yet it was of the same kind with *Packington's* case, where the house stood in the park; they being planted to answer the house, and for its ornament and shelter. But there is no case of tenant for life without impeachment of waste, where it has gone farther. What is insisted on for the plaintiff, is true in general; that law or equity does not depend on the particular cases, but on the general reason running through them: and therefore if a new case happens, not the same in *specie*, but essentially within them, the same rule ought to govern. It is therefore inferred, that the court ought in general to grant an injunction against tenant for life without impeachment of waste, for cutting down any timber not full grown or proper for building; or any, the doing of which might be a spoil or prejudice to the estate for the future. Something of that kind might be wished for; but it is in general difficult to attain and inconvenient to do it. Nor does it fall within the reasoning of the case mentioned. Was the court to take such large strides, resort must always be to a court of equity; for no certain rule can be laid down, as it cannot be taken from the value of the trees; which will differ according to the sort and circumstances: nor from the purchase of estates; and some timber may be fit for one kind of building not for others. But the reasoning of the cases of pulling down farm or mansion-houses, or trees, for ornament or shelter does not come up to this; for the consequence of cutting down timber, perhaps too young, does not tend to the destruction of the thing settled: although it tends to its prejudice for a time; for timber will grow again in a few years: not so of houses. Nor will young trees planted in avenues pulled down serve for the purpose as before; for having been put there for the convenient enjoyment of the house, they are considered as appurtenant thereto, and can no more be destroyed by such tenant for life than the house itself. But it would be very dangerous for the court to use such a latitude as to extend this to the taking away the profits of the estate by tenant for life to the prejudice of the remainder-man; which his estate for life without impeachment of waste gives him liberty to do.

This on the general question relating to tenant for life without impeachment of waste under a settlement.

Next consider, how it stands on the circumstances; which are very special, and which differ it from the case of a father making a settlement on a son. But it is all in his own hand-writing, who does not appear to have been bred a lawyer: and though a counsel was said to be employed, there is no evidence thereof. It is natural to conclude, that from the variety of the expressions in the additional words to the clause, wherein he makes himself tenant for life, he thought, there was some difference. Beside, the term for her reimbursement is extraordinary, and absurd to suppose he meant to leave her at liberty to cut down and [267] strip the estate of every stick of timber (which are the natural *botes* for repairs) and then to come by this term to be reimbursed her expenses in buying timber for repairs: it being contrary to the plain intent; which was, that she should be tenant for life, without impeachment of waste to prevent trouble in little matters; but still that the timber growing on the estate, and the natural fund for it, should be applied for that: but that she should be reimbursed out of this term, what she should *now*

out of her own pocket. Therefore as the defendant has cut down timber on this estate without applying it to repairs, she shall have no benefit of this term till she has reimbursed to the estate, which she has so unreasonably cut away; and as to the future, the evidence being that she has left no timber fit even for the repair of farm-houses. I will restrain her by the decree from cutting any more timber off the estate without leave of the court.

The next question is as to the demand of the arrear of £300 annuity, and the interest of the £3100; to which, it is insisted, the defendant has lost her right upon two grounds: first, that she must be taken to have released this arrear to her son; or else that her permitting him to enjoy the estate without demanding it was in order to favour him fraudulently to the prejudice of the remainder. No authority is cited for such a resolution; therefore as it is a new case in *specie*, and the defendant expressly denies by her answer, that she released or remitted it, but, on the contrary, hoped, he would pay her; it is only to be inferred from her laches and acts, [See 10 Ves. 453.]: and it is carrying it too far to say, because the owner of a charge upon an estate lets it run in arrear eight years, it must be presumed absolutely released. There is no such statute of limitation to bar her: and no such length of time inferring presumption of payment. It is compared to the case of pin-money suffered to run in arrear; which shall not be allowed for more than one year: but that is not merely on a supposal of her having given them up to the husband; but on this, that, having lived with the husband, she is supposed to have received satisfaction that way. But where the wife lived separate from the husband (which was the case of Lady Derby) and had no allowance from him, the court would decree an account as far back as the arrears go; because there could be no such presumption: which shews, that the cases of pin-money do not go on length of time: it is compared also to the case of bills of exchange, where credit is given beyond a reasonable time: but that stands on a different reason. The drawer is presumed to have money in his hands to answer it: and therefore if the payee does not use diligence to get it, but suffers the drawer to go on, it is lost by his default in standing by and seeing the fund drawn out, in a manner he ought not to do; and it does not go upon the intent to give it away. Then the case put of the mortgage concludes against [268] the plaintiff. If a prior mortgagee does not bring an ejectment to recover possession, and the interest runs in arrear, a subsequent mortgagee shall notwithstanding not be permitted to redeem him without paying the whole interest so run on; because though the second mortgagee could not enter, he was not without remedy; for he might have brought a bill to redeem, and so had the estate himself: but if he did not, this court has often appointed a receiver to keep down the interest; which the court will not in general do, unless where prior mortgagee will not enter: but if he does not take that remedy, he shall not redeem without paying that arrear: and the mortgagee often suffers the arrear to run on with a design to get in the estate on which he lent his money, and become the purchaser: which may be called an ill intent, yet shall he not lose his interest. Then fraud and collusion is never presumed, but must be proved, either expressly, or by necessary consequence from the acts done. The defendant was very bountiful to her son: and though it may be called a deceit on the son's power to make a jointure, it was an honest one in this

case; parting with her own money to induce him to marry. It must not be thence inferred, that the defendant by this favour to her son, intended to prejudice the remainder; which she could not then see would come to the plaintiff, as the son might have had issue, who would come to the estate before the daughters of his father: nor can the defendant be presumed to have left this burthen to prejudice such issue. There is no ground then that she should lose this demand. But another circumstance is admitted, beside the not appearing that she intended to remit this in favour of her son, viz. that the defendant has now seven daughters, beside the plaintiff, who is owner of this large estate as tenant in tail; and it is reasonable for the mother to endeavour to increase her own personal estate, to enable her to make a provision for the rest.

HOPKINS v. HOPKINS, [June 3, 1749.]

(Reg. Lib. 1748. A. fol. 644.)

Vide S. C. Ca. Temp. Talb. 44, and 1 Atk. 581. Mr. Sander's edit.—Contingent remainder upon executory devise. Rents and profits undisposed of belong to the owner of the inheritance, or persons intitled to the enjoyment (1).

Contingent remainders supported, though no trustees to support inserted.

JOHN HOPKINS (c), being by the decree of Lord Talbot intitled to the rents and profits of the estate devised by Mr. Hopkins till some person came in esse, who should be intitled to the estate in possession according to the will, although the actual enjoyment of the whole was suspended by the proviso in the will; had afterwards a son, who was the first person so intitled to take this estate by executory devise according to the decree; but that son died. His father was intitled out of the rents and profits for his maintenance by the said proviso; but the question was, what should be done with the profits over and above that maintenance?

The son of Anne Dare brought a bill for that surplus, as the [269] first person in being capable of taking possession under the will.

Lord Hardwicke (d) had been of opinion against him; for as by the said decree he was not intitled to the estate in possession, he consequently was not intitled to the rents and profits: that as this executory devise was once vested, the rest were contingent remainders upon that executory devise: and that the (e) inheritance was sufficient to support that trust, although no trustees to support, &c. were inserted.

John Hopkins had no other son, but his daughter had a son: and the question now was, whether that should determine the right of John Hopkins to those profits during the life of that son.

LORD CHANCELLOR.

I am of opinion, it shall not; for that can only be on the foot of that son's being the person intitled to the possession; which he cannot be, as

(c) P. Wms. 33. Dougl. 323.

(d) 1 Atk. 581.

(e) Trustees of the inheritance sufficient to support contingent remainders, 2 Vol. 230.

(1) *Vide Bullock v. Stones*, 2 Vol. 521.

he is in the same case with the son of *Darc*: since *John Hopkins* may still have a son born, who will take before the son of his daughter, as the court has held this to be a contingent remainder upon the executory devise. The son of the daughter then is not intitled to maintenance out of the profits; not being intitled to any of the profits at all. Nor can the representative of the dead infant be intitled to these profits: and none but *John Hopkins* can; whose right thereto is not determined, till a person comes *in esse*, who is intitled to an estate for life in possession, which this son of the daughter is not; as other persons may now come *in esse*, who could not take, if he once took; for then no person coming under a prior limitation can move or turn him back; for it will not open and shut, as it will at common law: though it was endeavoured at by Lord *Macclesfield*.

Vide cases in the time of Lord Talbot, where the will is stated, 44.

K. v. DALY, July 24, 1749.

In Exchequer.

Where notice should be given of the issuing a commission for an inquest.

MRS. DALY, having been found heir at law to the Duke of *Buckingham*, and hearing that an inquest of office was to issue for the crown to inquire, whether by the attainder of one of her ancestors in *Ireland* the lands did not *escheat*? now moved the court for an order to give reason-
[270] able notice of the issuing such commission, citing several old statutes, which have provided penalties on the sheriff for executing them privately: as 34 E. 3. 36 E. 3. 23 H. 6. 17. 1 H. 8. 8. and a case in the time of Chief Baron *Pengelly*, when an inquisition was set aside for a sheriff's refusing to hear evidence.

This was opposed by the *Solicitor-General*, as it would give the jury power to try a mere matter of law; whether the attainder can effect lands in *England*; which question being debated before the *Attorney-General*, he was very clear for the crown. There is no precedent of such notice; *Inquests of office* are merely *ex parte*, and not conclusive evidence: and since the statute of E. 6, great alteration is made therein, as the defendant may now traverse such inquest.

And for that reason, and it being the general rule that no notice need be given of executing *inquests of office*, Lord Chief Baron *Parker*, although he thought this a favourable case for notice, was against introducing new inventions in practice and altering the law.

But the three Barons, *Clarke*, *Clive*, and *Legg*, were of a different opinion; for though they agreed, that if this was an application for a general rule, that in all cases of *inquests* notice should be given, they should be against it: yet the circumstances of this case considered, it ought to be given. If the party has an opportunity of being present, she has certainly a right to be heard, and lay her evidence before the jury; nor is there any objection to the assisting the party to do so: and though the attainder may be matter of law, there are several facts of which the jury have a right to judge: nor is this any injury to the crown, whom it does not prevent from laying their case before the jury at the same time, and this can happen but seldom; for there are few cases in which the party can come

and show a reason for such notice; which is previously necessary. And although the inquest may be traversed, it is a great hardship on the subject to contend with the crown; and security must be given, which may be difficult to get for so considerable an estate. What the jury ascertain, which ought to be the truth, may be different if heard *ex parte* from what it would otherwise be. The several statutes before E. 6. are material: and the same reason which introduced them, the requiring things to be publicly executed, holds in the present case. Therefore such order for notice ought to issue.

CHAPMAN v. HART, June 29, 1749.

[271]

(Reg. Lib. 1748. A. fol. 695.)

Devise of all lands and tenements in or near F. by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold.—*Contra* if he only had leasehold. Bequest of goods on board a ship, is good, though they may have been afterwards removed, and were not on board at testator's death. The court will not supply the surrender of a copyhold in favour of a wife or child, under a merely presumed intention to devise it.

Neither choses in action, or securities for money, pass under a bequest of "goods and chattels."

What passes by devise of all goods and chattels in a house. Not a bond or chose in action.

Difference between a legacy of goods on board a ship and in a house.

JOHN TOLLER, captain of the *Warwick* man of war, devised all his lands and tenements in or near *Fowey* to the plaintiff; and farther gives to her for her care of him during his sickness at *Antigua* £500 and all his goods and chattels in his house, and on board the *Warwick*, and also his engraved silver salver, and two sets of casters now on board the *Warwick*, to be by her disposed of to such of his nephews and nieces as she should find most friendly to her, they to have them, and to be kept as *memorandums* of him. He died, after he had quitted the *Warwick*; and ordered his goods on board the *Somerset* under the captain's care.

The will was executed in the presence of two witnesses only: and therefore admitted on the part of the plaintiff, that it was not sufficient to pass lands and tenements in fee; but insisted that if the testator had any leasehold-lands or tenements in or near *Fowey*, the will being duly proved in the ecclesiastical court, was sufficient to pass them: and that there should be an inquiry for that purpose; for that on the authority of *Rose v. Bartlet*, [Cro. C. 292.] *ut res magis valeat*, the leasehold would pass, as the freehold could not [et vide *Jihell v. Beane*, Ante, 215. and see 6 *Ves.* 640, &c.]

Against which it was said, the court would not put the parties to the expense of inquiry, where there was no ground for it: that there was any leasehold was denied by the answer; which was not replied to. In the late case of *Smith v. Smith*, where one devised an annuity for ever out of all his lands to a charity, it being clear that it could not come out of the freehold, it was argued, that to complete the intent it should take effect out of the leasehold. But his Lordship held, that he would not

alter the rules of law, merely for the sake of making a void will take effect.

It was next insisted for the defendant, that the goods, not being on board the *Warwick* at the testator's death, did not pass. Although wills speak from the making to some purposes, as in the case of land or a specific thing, yet not in such general devises of goods; which mean goods in such a place at the testator's death, like the devise of all furniture in a house. 2 *Vern.* 688, 739. and yet the devise of furniture is more a specific bequest than of goods on board a ship. The general rule in *Swinburn*, that the time of making the will, not of the death of the testator, is to be regarded, has so many exceptions, that it can hardly be called general.

Swinburn by specific things means identified by the will itself; [272] but that is not the case here, which is like a devise of all his horses in a stable, or hay or corn in a barn, meaning only those at his death: and the confining the time of *now on board* to a few particular things makes it like the cases in *Eq. Ab.* 199, where money did not pass, because something particular was devised beside, and it shews a different intent.

To which it was replied, that this would be a specific bequest, if the goods were still on board the *Warwick*; nor would it abate in proportion. The only difference is, that instead of mentioning them in a particular schedule, he has comprised them all, and described them under the words *goods in the Warwick*; and where the locality is mere description, not essential to the devise itself, the removal is no ademption of the legacy; for which there must be always *animus revocandi*; which is not shewn here. As to the cases in *Vern.* there was a necessity for that construction, being things fluctuating and perpetually wasting; and therefore determined to mean those at the death; but no such necessity for standing goods.

LORD CHANCELLOR.

Though the plaintiff has not behaved according to the strict rules of law, in possessing her legacy without the consent of the executor; the strict rules of the civil law do not hold here so as to be a forfeiture. It is not certain that the testator had any leasehold in or near *Fowey*; and by the answer it should rather seem, he had not: If there should appear to be both (for I must take it, there were freehold) and the law was with the plaintiff, so that she would be intitled thereto, it would be a ground for the direction of an inquiry; for the answer is not a positive negation of any leasehold. But if, let the fact come out how it will, the law should be against the plaintiff, I ought not to direct an inquiry; which would be of no benefit: and I am of opinion, that though it should appear the testator had leasehold as well as freehold, the plaintiff could not be intitled. It is clear, since the case of *Rose v. Bartlet*, that such a devise should be confined to the freehold, and the leasehold should not pass, unless there were only leasehold; for then they should, that the will may have some effect. But the distinction taken for the plaintiff does not hold; for it is applying the reason in that resolution in *Rose v. Bartlet* to a different purpose from what it is there; where it is applied to the construction of the words, the intention of the testator arising from the fact. Here it is a presumed intent, arising not from the words, but from a defect in the execution of the instrument, and his supposed knowledge in the law of that defect, and that

he intended to pass only what might pass. But that defect in the execution of the instrument cannot warrant the court to make a different construction from what it would if duly executed; which then would be, that the freehold lands only would pass. Suppose a [273] case (which though I do not know to be determined, I should not doubt to determine so) (1) of a person seised of freehold and copyhold in *D.* who surrenders to the use of his will, and devises all his lands and tenements in *D.* to a child; there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but if no surrender to the use of the will, only the freehold would pass; to which *lands* and *tenements* generally mentioned shall be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender, though this were to a child or wife, the court would not supply the defect of surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly executed; when, if duly executed, the court would not have supplied that defect: for such variation of the construction would be very dangerous, and might make terms, and perhaps terms attendant on the inheritance, to pass. There is no ground therefore for an inquiry.

As to the next question; undoubtedly no goods and chattels in the house can pass but such as were properly in possession, not *choses in action*; except bank notes, which the court considers as cash: for these words may certainly extend farther than to bare furniture: and if any ready money in the house (if (*f*) not an extraordinary sum, and just received) that would pass. In the Countess of *Aylesbury's* case (2), I was of opinion, that by devise of all things in a house, money and bank notes passed to the testator's wife, and the testator meant to consider the notes as cash: * but bonds do not pass: not admitting of a locality, except as to the *probate of wills*, &c. I think, there is a difference between a legacy of goods on board a ship, and in a house: although I know of no case of this kind. The general rule is, that in a devise of all goods in a house, that description relates to the death of testator: and if removed, they would not pass. The Duke of *Beaufort's* case, 2 *Vern.* 739; but in such a devise of goods on board a ship, it must be supposed to be done in consideration of the several contingencies and accidents they were liable to; and if it should be determined, that if by any accident they should not be on board at his death, they should not pass: it would defeat several marine wills. If the goods were removed to preserve them, the ship being leaky or likely to founder; or if he is removed to another ship, (which is a contingency he is subject to daily) and he is forced to obey; this would not

(*f*) In *Prec. in Chan.* 8. by such a devise, a sum of money was held not to pass, as being too large for testator to be ignorant of its being in his house; and if he intended it should pass, he would not have couched it under such general words.

* 1 *Brown*, 127.

(1) See *Church v. Mundy*, 12 *Ves.* 426. 15 *Ves.* 396.

(2) *Amb.* 68. but corrected and stated accurately per Lord *Eldon*, Chancellor, 11 *Ves.* 662.

defeat the legacy. But farther still ; upon such a contingency, goods in a house would pass : as suppose the goods removed on the account of fire ; and soon after, before they could be re-settled, the testator dies ; they should be considered as being in the testator's house at his death : and the legacy is not defeated by that accident. So the removal of
 [274] these goods out of the ship, it being a description so precarious, does not infer an intention to revoke ; which must always be in such cases ; or at least an intention in the testator in the creation of the legacy, that if the goods should not be there at his death, they should not pass. As to the supposing a different intention from the word *now* in the subsequent gift, that rather turns against the defendant. There might be something in it, if that clause of the plate was not introduced for a particular purpose, for the sake of the devise over, not to increase the bequest ; which makes it like the case, where the executor was held not to be excluded from the residue by the bequest of a particular thing, because it was not mentioned for the sake of giving any thing new, but of the limitation.

POTTER v. POTTER, July 6, 1749.

Rolls.

(Reg. Lib. 1748. B. fol. 385.)

S. C. Post. 437.—Answer of heir believing that a will was made, will not prevent the necessity of its being proved.

UPON a bill to establish the will of the late *Archbishop of Canterbury*, it was objected for defendant, the heir at law, that the will was not proved ; and that the answer only believed a will was made, but did not directly admit it, and was not replied to ; and that in the late case of *Ogle v. Cooke* (1), December 10. 1748, Lord Chancellor would not establish a will not sufficiently proved, but ordered it to stand over.

And the *Master of the Rolls* said, though it was generally true, that what the defendant believes, the court will believe ; yet there was no precedent where the court decreed the establishment of a will not proved or admitted by the heir at law ; and the cause must stand over with liberty to reply (2).

(1) *Ante*, 177.

(2) The plaintiffs were to be at liberty to exhibit interrogatories in the examiner's office to examine, &c. and to be at liberty to reply, &c. and the parties were at liberty to examine any witnesses to any of the matters in issue, and to examine the witnesses already examined, notwithstanding such their examination, Reg. Lib.

LEWIS v. HILL, June 6, 1749.

(Reg. Lib. 1748. B. fol. 556.)

Covenant in marriage articles to purchase and settle lands. Lands purchased, and suffered to descend, taken in satisfaction of it.

The purchase of houses in London will not answer a covenant to purchase lands of inheritance (1).

SIR ROGER HILL upon his marriage covenanted, that he, his heirs, ex-

(1) See *Pinnel v. Hallet*, 2 Vol. 276. S. P.

ecutors or administrators should purchase a good estate of inheritance in fee, free from all charges, &c. of the yearly value of £600 or more; which lands should be settled to his use for life, afterward part thereof for a jointure, and the whole upon the issue of the marriage, remainder to his right heirs for ever.

He afterward purchased lands, which he did not settle according to the covenant, but devised away in a different manner; and after making the will he purchased the inheritance of several houses in London, and some lands of £70 *per ann.* and died without per- [275] forming the covenant.

The bill was brought by the plaintiff and his wife, as heir at law (3), against the persons intitled to the personal estate, and to have the covenant performed by the purchase of lands of £600 *per ann.* thereout.

For plaintiff. The first question is, whether the heir at law is intitled to come into equity for a specific performance of these articles against the executor? which question has often arisen; and was determined at last, that he is. *Lechmere v. Lechmere* [Talb. 80.]; *Vernon v. Vernon*; and *Deacon v. Smith*, on a bill of review, March 26, 1746. Every claimant under the articles has such right: and therefore the plaintiff, though standing in a different light from the others, has the same right to have them substantially performed, on the ground that things, which ought to be done, are looked on here as done.

Next whether what has been done shall amount to a performance; although not done by deed, it shall have the same effect; which is the foundation of *Blandy v. Widmore*, [1 P. W. 324.] and that depends entirely on the intent; because he is master, as between his own heir and executor what shall be considered as land, what as money, and whether he will leave an equivalent to the person, to whom he was under an obligation; as in *Wilcox v. Wilcox*, 2 Vern. 558. The general heads, from which this intent is to be collected, are from the nature of the act, the sort of purchase, and positive express proof; of the last of which there is none here. It can only be implied from his purchases, that he meant to apply them to the covenant: the force of which presumption may be taken off: as by a sale or devise inconsistent with the covenant: nor can it be said, there was a specific lien by the articles. It was so held in *Deacon v. Smith*, and that the intention was the rule. If then the presumption is destroyed as to estates purchased before the will, much less does it hold as to those subsequent; for as to the £70 *per ann.* they were parcels of land joining the estate, for the convenience of which they were purchased, not with a view to answer the covenant: as to the houses, they from their nature being different from lands, and a wearing estate, cannot answer the covenant, by which was meant land: so that if it had been the bare ground rents, which it is not, that would not do. It was held in the cases before mentioned, that reversions, which were argued to be a satisfaction *pro tanto*, could not be so applied. Though a settlement of lands is not always in contradiction to houses, these houses could not be a purchase proper to be settled on the issue; nor could tithes be settled under these articles.

For defendant. These purchases shall be considered as an- [276]

(3) Not exactly so, but by persons claiming under a conveyance from persons who were his heirs, and who were entitled under the covenant. R. L.

swearing the settlement so far: and the purchase of houses in possession, being an inheritance, is a compliance with the covenant. By devise of lands in a place, houses, if no lands, will pass; nor ought this to be sent to the *Master* to see, whether it is a proper purchase.

LORD CHANCELLOR.

I will look into the case cited: but though I must go as far as the precedents, I will not go farther in decreeing a performance.

The cause was afterward compromised.

DEBENHAM v. OX, July 7, 1749.

Bond given as a reward for using influence over another's estate, for benefit of the obligor; decreed to be delivered up without costs.

Bonds in fraud of marriage agreements set aside on public policy.

(g) THE bill was for delivering up a bond given by the plaintiff to the defendant's wife, in consideration that she would make use of the influence and power she had over *Thomas Yerle*, the plaintiff's grandfather an old man of eighty-two, that he should dispose of his whole estate for the plaintiff's benefit, and give security that he would not alter the will he made in the plaintiff's favour.

For plaintiff. It was insisted, that such bonds ought not to be encouraged in equity; being upon a consideration contrary to the policy of the law, and like marriage brocage bonds.

For defendant. A bond is not rescindable merely because gratuitously given; for a voluntary bond may create a debt, unless some fraud. Marriage brocage bonds are inconvenient to the public on this foundation, that these contracts should be made on other motives than those of interest, and are almost rescindable of course in equity. In *Beckley v. Newland*, 2 P. Wms. 182, though a kind of partition treaty of a man's estate before his death, it was carried into execution.

LORD CHANCELLOR.

This is new *in specie*; there being no case of a bond by way of reward for influence over another person's estate for the benefit of the obligor. As to the bond itself, it is admitted to be given without any consideration: and that, which is insisted on, would be going further than the policy of the law will admit, which ought not therefore to prevail; especially as the grandfather from his age was probably weak, and thence more liable to such influence. I remember a passage in *Tully* of a will obtained by doing complaisant and flattering offices about a person, *Blunditiis, &c.* *Beckley v. Newland* (1) is different; the contract there being framed on a contrary principle to this, viz. the avoiding all undue influence. Yet this is not like marriage brocage bonds; which proceed on another ground, that nothing inconsistent with the open contract on marriage should be done.

But as to costs: the defendant ought not to pay them. Indeed there is

(g) 2 P. Wms. 394. Talb. 97. 5 Burr. 2698. 1 Brown, 124.

(1) 2 P. W. 182.

hardly a case of a bond set aside for fraud or improper consideration, but it ought to be with costs, from the bad ingredient; but this differs; the plaintiff himself being *particeps criminis*; so that if it had not been for the ingredient of public policy, he could hardly have come here for relief. (h) In all those cases the court sets them aside, not for the party's sake, but for the benefit of the public: as a marriage brokerage bond (2): or a bond by the husband to return part of the wife's portion to her father, without the privity of the husband's relations; or on the other hand a contract to give back part of the estate. In all this, the husband has done wrong, and is *particeps criminis*; yet because the objection, that infects the bond, arises from public consideration, the court will relieve; yet in several cases have not given costs: that is where the husband himself has come to be relieved against what he has done with his eyes upon. And here the plaintiff himself solicited to give this bond, and got it prepared: the bond therefore was given upon undue consideration, which ought to receive no countenance in a court of equity, and should be delivered up. But by reason of the part the plaintiff himself appears to have had, no costs on either side.

(h) Post, 503. 2 Vol. 264, 375.

(2) See *Scribblehill v. Brett*, 4 Bro. P. C. 144. oct. edit. and the note at the head of the case. Also post, 503, 505, &c.

LORD TRIMLESTOWN v. COLT, July 8, 1749.

Daughters portions by will charged on personal, then on real estate with interest for maintenance; so far as the personal deficient, they carry but 4 per cent.

(i) ISAAC COLT having by will given his daughters portions, charged first on the personal, then on the real estate, with interest in mean time for their maintenance; the question was, what rate of interest?

The daughters contending it should be 5 per cent. legal interest being always meant by *interest* in general, it being so determined where upon personal estate; and this being a provision for a child by a father was with a liberal view.

Against which it was insisted, there should be but 4 per cent. [278] this being to be esteemed as an original charge on real estate.

LORD CHANCELLOR.

If these legacies were merely to come out of personal, which was sufficient, being given with interest, it should be considered as legal interest: but if the personal estate is deficient, it should be considered as a charge upon real. I will not say, but there may be cases, where charges in general on lands with interest may be considered as legal interest; but there is something particular in this being expressly for their maintenance; which makes it a middle case, and different from a general charge with interest in mean time; the reasonable construction being to determine it to be such rate of interest as is usually given for maintenance in case of a portion charged on land (k), viz. 4 per cent. So far therefore as the personal estate is deficient, let it be but four.

(i) Prec. Chan. 377, 405. 2 P. Wms. 419. 2 Atk. 343. 2 Vol. 487.

(k) Ante, 171. 2 Vol. 239.

KEMP v. WESTBROOK, July 8, 1749.

(Reg. Lib. 1748. A. fol. 602.)

Bill lies by assignee of bankrupt for account and delivery of goods pledged by the bankrupt notwithstanding the statute of limitations.

1 *Bul.* 26. Pawner has time during life, where no time given for redemption. Remainderman not bound to enter on forfeiture of the particular tenant, and if he comes within his time after the remainder attached, the statute of limitations will not bar. In what case a bill may be for redemption of pledged goods.

THE bill was brought by an assignee under a commission of bankruptcy against *Cordwell*, for the re-delivery of jewels and plate pledged by him to the defendant, who had also given a promissory note for the delivery over of those goods to the assignee, or the value of them, upon the assignee's paying him all that was due.

The statute of limitations was insisted on by way of defence; which being to quiet possession, is in general to be construed favourably. Beside the plaintiff has no right to come into equity; this not being like the case of a real estate, where time is given for payment, and on non-payment to vest in the mortgagee; for there a remedy must be in equity, as none at law: but this is a mere pledge; and if this is allowed, there would be an infinite number of such bills for the redemption of such deposits. *Trover* will lie for this, in the same manner as if the pawn was disposed of, and damages for the conversion: and then after the time limited by the statute for an action of *trover*, it could not be recovered, notwithstanding the right to redeem.

LORD CHANCELLOR.

There is no colour for the statutes being a bar to this demand; no time being given for redemption, *Cordwell* had time during life to redeem, according to the case in *Bulstrode*. Then so had the assignee till tender or payment of the money; before which, on the face of the note, *trover* would not lie. It is something like the case of a remainder man expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years: yet he is not bound to do so; therefore if he comes within his time after the remainder attached, it will be good, nor can the statute of limitations be insisted on against him for not coming within twenty years after his title accrued by forfeiture, I will not say in general, that there is a right to come into equity in every case to redeem pledged goods: yet there are cases, where it may be. As the pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of the stock, but may sell it, and notwithstanding, the mortgagor may bring a bill here, for an account of what is due, and to have a transfer to him. But there is a strong reason for it in this case; the plaintiff, being an absolute stranger to what is due, has a right to come here to know it, in order to make a tender, which he cannot do without tendering the precise sum; and therefore could never make it, if not allowed to come here first to know that sum.

UNDERWOOD v. HITCHCOX, July 11, 1749.

Specific performance of agreement refused under circumstances of inadequate consideration.

Specific performance of agreements: in what cases decreed.

THE defendant articed with his uncle for the purchase of a copyhold estate in fee. The plaintiff soon afterward proposed to the defendant to purchase this estate from him: and an agreement was entered into for that purpose. The uncle surrendered it to his nephew and his wife, and to the heirs of their bodies, remainder to the nephew in fee.

For Plaintiff. It was insisted, that the defendant's thus taking a conveyance of the legal estate in a different manner from what he was intitled to in equity, by placing the estate in his wife voluntarily and without consideration, was fraudulent, and made him guilty of a breach of trust with respect to the plaintiff, in contradiction of whose agreement with the defendant it was; of which agreement the court therefore ought to decree a specific performance. The uncle might have been compelled to carry these articles into execution, and should therefore be considered as trustee for the defendant, and as to the objection, that the consideration by the plaintiff was inadequate; the annual, not the gross value of the estate is only put in issue; and therefore the defendant shall not examine as to the gross value.

LORD CHANCELLOR.

The rule of equity in carrying agreements into a specific performance is well known (1): and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law; it depending on the circumstances. And undoubtedly every agreement, of which there should be a specific performance, ought to be in writing, certain (m), and fair in all its parts, and for adequate consideration; and on all the circumstances of this case there is not suf- [280] ficient ground to decree this; the principle argued for the plaintiff, although in general true, not being applicable to the present case. If a voluntary conveyance of an estate without consideration is made for the benefit of his own family, or any one else, by one who is indebted (1) at the time of the settlement, or sells it afterward, it is fraudulent by the statutes *Eliz.* which place it in the purchaser for valuable consideration against the volunteer. And therefore in this court, if the person intitled to an estate to himself and his heirs, takes a conveyance of the estate, so as to put a right in another, the court will consider it fraudulent; upon which kind of equity the court has gone. As if a bond, or mortgage, or conveyance of the estate, is taken to himself and his wife, making her joint-purchaser,

(1) Ante, 220. 1 Brown, 396.

(m) 2-Ves. 52. Estate sold for a sum of money and an annuity, as the agreement was fair, a specific performance was decreed, though the party died before any payment of the annuity. 1 Brown, 156, where there was a concealment on the part of vendor, a specific performance denied. 1 Brown, 440. Agreements not to be set aside but upon broad grounds. 2 Brown, 17.

(1) Vide ante, 27, and note.

obligee, or grantee, so as to intitle her to survivorship if he die in her life ; yet that shall be considered as a mere voluntary act with respect to creditors, and fraudulent : although as between the wife and the heir or executor it shall prevail, because his gift is sufficient to exclude them : and if it rested singly on that, I should think it would be so here. But that must be in a case where the husband, as a purchaser for a consideration moving from himself, is to pay the price for the estate, and no consideration of bounty arising from a third person, inducing him to make the conveyance in that manner. And here the uncle, from whom the estate moved, not caring for the management of the estate, intended to make a conveyance for the benefit of his nephew, and as a bounty to him and his family, and to go in that manner : nor was the consideration adequate between the uncle and nephew ; upon which if the uncle had insisted, on a bill brought by the defendant for a performance, the court would not have decreed it : therefore not to be considered as a trustee.

Next as to the plaintiff's agreement, I am of opinion, that it is not under such circumstances as that the court ought to decree a performance against the defendant ; for the consideration appears inadequate, though unskillfully put in issue : but it would be a very nice rule to go by, that because only the annual value is put in issue, the gross value should not be examined to : yet if the plaintiff insists upon trying the value, I will not preclude him from it ; but then he shall pay the costs on the dismissing this bill : otherwise not.

Upon the whole, it is too hard to decree the defendant to make a surrender of this copyhold estate for so inadequate a consideration.

[281] BURLEIGH v. PEARSON, *July 12, 1749.*

Power of appointment by a father not well executed : being contrary to the intention, as collected from a reasonable construction of the recital of the deed, which created the power. "And" construed "or."

HERCULES BURLEIGH, previous to his marriage, by a deed of trust declared the uses of a copyhold estate belonging to his wife ; reciting, that to make a provision for the maintenance and preferment of such younger children which they should leave unmarried, and unadvanced or otherwise provided for, at their deaths ; and for raising such sums as they think requisite for the fortunes and preferments of such younger children, the trustees should raise £1000 to pay the same to such younger children in such manner and proportion as they should appoint by writing ; and in default of appointment by both, then to the said younger children or some of them, as the survivor should appoint by writing or will : in default of appointment, equally to be divided among them.

The husband surviving, and being eighty years old and having the plaintiff and four younger children, makes an appointment by will ; giving £50 to be paid for *Finlay*, who had married one daughter, in satisfaction of a bond of £50 which he owed, and for which the elder son was joined in security : £125 to *Campbel*, who had married another

daughter: the remaining £825 to his son *John*; to the other son *Henry*, nothing.

In support of this execution of the power it was argued for *John*, that it was in the power of the parties to make an unequal appointment, even so as to give it all to one, as appeared from the words; which discretionary power a court of equity will not take away, unless on the foot of injustice by making a bad use of it; which inequality could not be said to be: *Austen v. Austen*, by Lord Talbot. [*Cas. Tal. 74.*]

For the other three younger children it was argued, that the power was not completely executed: the defect therein could not be supplied in this court: and it should be set aside. In the case of *Shadwell his Lordship* held, that this court would not supply any defect to support inequality: wherever discretion is abused, the court will interpose; as where collusion, or an illusory share is given to one; although not, for inequality alone whether left to discretion; citing also *Mensey v. Walker*, by Lord Talbot. [*Forr. 72.*]

LORD CHANCELLOR.

The deed, by which this trust is created, is certainly very inaccurately penned, but a reasonable construction must be made: and that from the intent of the parties fully declared in the beginning of [282] the deed, which is the leading clause; and therefore other doubtful words, if any, ought to be controuled and construed by that plain declaration of the intent, which was to make a provision for those younger children, who should be left unmarried, &c. to which description the word *such* is plainly relative. And, after *unmarried*, must be construed *or*: and the negative must run through the whole, otherwise it is absurd; for they certainly meant *unprovided for*; and then a child though married, if not advanced or otherwise provided for, would be the object of the power: and in this sense he has used it in his will. Then *such*, refers to the description before, the governing clause through the whole, and does not mean a general power to appoint to one or two; for all must have some. The contrary construction would overturn the intent; empowering to give the whole to a child even provided for, and to leave the rest unprovided. But the most doubtful part, and most in favour of *John*, is from the words *or some*: but it would be strange to construe this deed so as to leave greater power to disinherit in the survivor, than was given jointly; especially if the husband survived, as happened, when it was the wife's estate. The addition of *some*, must mean some of those under the qualifications before described, in the same manner as *such*. Another inaccuracy occurs afterward, in case of no appointment; for it must not be construed to be divided among all, as well provided for as not; but means the said younger children, *viz.* unprovided. Then the execution of this power must fall to the ground; *Henry* having nothing; and Mrs. *Finlay* but £50 to pay a debt of her husband in exoneration of the elder son; not being given for her benefit, although by possibility the discharging her husband's debts might tend thereto; for it might be otherwise: but a father having such a power cannot, unless he has a power to annex a condition, restrain a child's share to the payment of a particular debt; for there may be a defence to that debt. Not that I say, the court might not hold the execution good, and the condition void; but to what purpose, when it would

be contrary to the intent of the power? According to which, this cannot take effect; therefore it is void in the whole, and this £1000 must be equally divided.

JOHNSON v. MILLS, July 17, 1749.

On Appeal from the Rolls.

(Reg. Lib. 1748. A. fol. 597.)

Executor bound to set apart a fund to answer future demands under a contract.

EDWARD MILLS, having absconded, wrote letters to his creditors, assigning to them his right of £2000, which would be due to him in right of his wife, after the death of his mother-in-law Mrs. *D'la Creuse*, who had an interest for life in the fund, out of which it was to come, and was executrix of her husband the covenantor in the articles.

[.283] The creditor of *Mills* bringing this bill to have the £2000 secured for the benefit, and set apart during her life, as a fund for their payment after her death; she opposes it, as having a right not to have it taken out of her hands, so as not to have power over it; for that the court never decreed a fund to be set apart for a debt, which was not to be paid by the contract itself till a future time, unless where danger of loss or insolvency; for then legatees might be intitled to such an equity before the time of payment on the foundation of justice; and that the fund liable might not be wasted. But a difference arises between the case of a legacy and a demand by contract; for by giving a legacy the testator himself creates a specific lien on his assets: whereas to affect her during her life would be a departure from the articles, unless she was intended to be a mere trustee: nor could the plaintiffs come against the original debtor or contractor during his life, and therefore not against his representative (1).

LORD CHANCELLOR.

I thought nothing was better settled, than what is now endeavoured to be made a question: that wherever a demand was made out of assets, certainly due but payable at a future time, the person intitled thereto might come against the executor, to have it secured for his benefit, and set apart in the mean time, that he might not be obliged to pursue these assets through several hands. Nor is there any more useful part of the jurisdiction of this court in the administration of assets: therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so as that it might fall into the bulk of the estate: and this is done to secure the interest of every party of course as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets. Nor is there any ground for the distinction taken between a legacy and a demand by contract: if any, it is rather stronger in the latter case, than that of a voluntary legacy. But in no case can you come against the original person, which would be for this court to decree a better security, you having trusted to that risk during his life. But the

(1) The present hearing was on an appeal from the rolls. R. L.

court distinguishes between the case of the original debtor and representatives; for in the former the trust is in the person, which is liable; in the latter the assets are liable, which this court will pursue farther than at law into whatsoever hands; considering it as the fund, although no specific lien. Against an executor the action is in the *detinet* only; the wrong arising from his detaining the assets, which are the fund for satisfaction: against the heir it is in the *debet* and *detinet*; he is to discharge himself by pleading no assets, or not beyond such a sum (1). *Mills* himself would have a right to this equity against her, to have this fund secured: [284] then so will the persons standing in his place. Her two capacities are mixed in the objection made to the plaintiffs; but that is mispleading; for they are different, one in her own, the other in another's right. If the testator had made a stranger executor, who would have stood in his place, and had the assets in his hands, she herself, or *Mills*, or those in his place, if she would not, might have brought a bill against that stranger, to have this set apart for benefit of the persons interested. Then that equity will not be varied because of the person made executor: and if the estates, which are the fund, are leasehold, the court will order sufficient to answer this demand to be set apart, as the court would do if they were mortgages (2).

(1) Vide Ante, 212.

(2) The Lord Chancellor affirmed the decree. R. L.

BARNESLEY v. POWEL, July 18, 1749.

(Reg. Lib. 1748. A. fol. 583.)

See ante, 119.—Forgery of a will.

Decree of *Exchequer* that a will is well proved, which is afterward found forged here; this court will decree that no use shall be made thereof.

Will of personal estate examinable in *ecclesiastical* court; but this court will avoid, if possible, the sending it there after the will has been found forged by a jury, which bound the real estate, and will go as far as they can to decree the parties trustees.

Probate obtained by fraud relieved against here, and the deed importing a consent thereto set aside here, not in *ecclesiastical* court; and the defendant decreed to consent to a revocation of the *probate*.

Acknowledgment of satisfaction decreed here on a judgment obtained against conscience.

AFTER a very long trial by a special jury a verdict was brought in against the will: with an indorsement that it was grounded on forgery, and not on any defect in the execution.

Upon the equity reserved it was argued for the plaintiff, that the trial had made an end of the question as to the real estate; and the decree in the court of *Exchequer*, that the will was well proved from the plaintiff's consent, ought not to stand in his way: for though this court cannot reverse it, they may decree, that it shall not be made use of against the plaintiff: and injunctions have been granted to the *Exchequer*, where it has clashed with this court. 1 *Vern.* 220. As to the personal estate, though this court cannot set aside the *probate* of the prerogative court, it may decree the executors, who have acted so ill as by imposition upon the plaintiff, to get this consent to the admission of that, which is a forgery, to be trustees for the plaintiff; since by their iniquity they have prevented

his getting redress in the *Ecclesiastical* court, where the probate is final, the time for appeal being lapsed; but supposing it not so, the validity of a deed, as the consent by proxy is, cannot be tried there. In a late case where the defendant burnt a will, in which was a legacy to the plaintiff, so that it could not be proved in the *Ecclesiastical* court (which cannot prove a will on loose parts of the contents of it) yet on evidence of there being such a will, and the defendant's destroying it, the court decreed the legacy to the plaintiff, as the defendant by his own iniquity had prevented the plaintiff from coming at it. So in *Thyn v. Thyn*; and in cases where the party has not been destitute of a remedy, the court has declared deeds void for fraud: and have at the same time considered the persons, in whom the legal estate vested, as trustees, to prevent injustice, to

those, in whose favour the deeds were set aside. In *Tucker v. Phips*, July 10, 1746, the plaintiff's bill was as legatee under the will, which, it was suggested, the defendant had unduly suppressed. The answer introduced another question of the sanity of the testator; which belonged properly to the *Ecclesiastical* court; yet his *Lordship* entered into evidence thereof; and being of opinion that the sanity was proved, would not put the parties to a suit in the *Ecclesiastical* court, but directed immediate payment of the legacy: citing there Lord *Hunsdon's* case, *Hob.* 109. And several instances might be put, where circumstances give this court a jurisdiction, which it had not primarily; as spoliation, and therefore forgery will: although in *Bransby v. Kerridge* (1), the trust decreed by Lord *Macclesfield* was reversed by the *Lords*, it is difficult to see upon what reasons. But in *Eq. Ab.* it seems to be, because a trial was not first directed. Upon the will of one *Roe*, Sir *Robert Jacob*, who, when desired to write a will, had put himself in executor, was decreed a trustee.

For defendant. The right to the real estate cannot be now disputed; but the verdict must be confined to that: but as to the personal, neither the court or jury had any right to examine into it; nor could this court direct it. *Bransby v. Kerridge* shews this court ought not to inquire into fraud in obtaining a will of personal estate: which, if ever it could have been done, would have been done in *Archer v. Mosse*, 2 *Vern.* 8. In *Paschal v. Pickering*, May 7, 1746, the plaintiff and Mrs. *Wiseman* (the defendant's testatrix) were intitled to the whole of Lady *Brumpton's* estate; and the plaintiffs brought a bill, charging that there were two testamentary writings: in one of which Mrs. *Wiseman* directed a note due to her from the plaintiff, to be given up to the plaintiff: by the other she directed, that whatever became of a suit, which had been instituted for the personal estate, she gave it all to the plaintiff; which writings the defendant had concealed and torn: and as every thing should be presumed in *odium spoliatoris*, the plaintiff claimed the whole, and to be relieved against an action upon that note. The questions were, whether a remedy was not proper in another court? and supposing so, whether this spoliation was a ground to proceed on? His *Lordship* held, that the papers were both testamentary in their nature, and therefore proper for the *Ecclesiastical* court: that as to personal estate, it was determined in *Bransby v. Kerridge*, that this court had no right: and that as to spoliation, though the

court has gone a great way; yet there is no case where it has gone so far as to direct the enjoyment of personal estate on the foot of a will: that in the case of one *Payne*, where an interlineation appeared on producing the will, the *Lords Commissioners* would not determine it, but gave liberty to apply to the *Ecclesiastical* court. So his *Lordship* would not relieve but retained the bill till proof in the *Ecclesiastical* court of those testamentary schedules. The present case would extend to that of insanity; which in substance is *forgery*; and there are several instances, though unfortunate, where a will has been found void for insanity as to real estate, and not as to personal; which, if it be a defect in [286] the law, wants the remedy of the legislature. Application may be in this case to the *Ecclesiastical* court: which may relieve by appeal to the *Delegates*, or commission of *review*, or by letters of administration; for they have such power, as incident to their jurisdiction, to correct their own proxies if obtained improperly, and to relieve themselves as well as the party, from such gross imposition: so as they may set aside administration obtained by fraud, in concealing a will or a *probate* appearing forged. Nor is it ever too late: for no length of time can give a sanction thereto. The plaintiff's proceeding is on an inconsistent foundation, that the defendants, the executors, are intitled to the personal estate by a *probate* of a will as valid, which the former part of the decree determines to be forged. But the plaintiff cannot be intitled, unless an intestacy appears; which cannot appear till tried in the *Ecclesiastical* court: nay, the contrary appears as two other wills, prior to the forged one, are in the answer set forth, wherein *Powel* is made residuary legatee; one in 1735, all in the hand-writing of the testator, and attested by him, but without witnesses; the other an unexecuted draft, without date, which is a sufficient testamentary schedule; the benefit of which would be taken away by such an immediate decree, even from other legatees, who are not parties. No evidence appears that *Powel* colluded in forging that will; for he opposed it, till proved and established in the prerogative court: and as a consequence of that opposition was obliged to pay the costs of that suit in the *Exchequer*, by an annuitant under the will.

LORD CHANCELLOR.

This is a case of a very extraordinary nature, and such as, I hope, I shall never see again. By the transaction and management between the parties something arises new; as there always will, since there are so many species and inventions of frauds; to correct which the court must apply their rules and the principles of them, as far as they can.

As to the real estate, there is very little difficulty; the will being the proper subject of the common law and of equity, in respect of the assistance which this court gives to come at the proper trial. The verdict, not complained of by the defendants themselves, is the strongest foundation for the court to go, as far as it has jurisdiction; and it is admitted to be conclusive. In consequence of which, and of my former opinion, the plaintiff must be relieved against all agreements, writings, or assurances, obtained by any of the defendants since his father's death, to be delivered up to be cancelled; as must also the possession of the real estate, with an account of the rents received. As to the decree in the [287] *Exchequer* obtained by the plaintiff's consent, that the will

was well proved, and an annuity established (the defect of which is now over, as the annuitant is dead) the best direction is, that *Powel*, party to that suit and claiming under that will, be restrained from setting up that decree in respect of the real estate, or claiming any benefit thereby. As to his paying costs thereof it was not founded on his opposition, but the costs followed the justice of the demand by the annuitant, as it does in a suit for a legacy.

As to the personal estate, I left it open in the decree, that the plaintiff should be intitled to relief in such manner as was agreeable to equity; because I saw, there might be litigation concerning the manner of getting that relief: whether immediately or by leaving the plaintiff to sue in the *ecclesiastical* court; both which are thereby taken in, which it would have been improper to have determined before; for if a verdict for the will, that would be out of the case. Undoubtedly the principle laid down for the defendant is true, and the jurisdiction of wills of personal estate belongs by the constitution to the *ecclesiastical* court; according to which law it must be tried, notwithstanding the will is found forged by a jury at law by the examination of witnesses; which is sometimes unfortunate: causing different determinations, as I have known it. Nor can this court help it; but the parties must take their fate, if by the strict rules of law it is so. But I will lay hold of any ground to alter that; nor give way, if I can avoid it, to run the hazard of these different determinations, and to try this will, so solemnly determined by examination of witnesses *viva voce*, again in the *ecclesiastical* court upon examination by deposition. Something of what the plaintiff insists on as a method to avoid this, fell from me at the hearing: and as to the general objection thereto, of breaking in upon the jurisdiction of the *ecclesiastical* court however formerly doubted, it is certainly now settled by the *Lords* in *Bransby v. Kerridge* (1), [see *ante*, 120.] that this court cannot set aside a will of personal estate for fraud. And though nothing was said there of forgery, that is stronger: nor will I infringe on what is laid down there, and in *Powis v. Andrews*, and in the case of Mr. *Hawkins's* will. But there is a material difference between this court's taking on them to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the *ecclesiastical* court by his fraud, not upon the testator, but upon the person disinherited thereby, and claiming after the testator's death against it. Fraud in obtaining a will infects the whole, but the case of a will, of which the *probate* was obtained by fraud on the next of kin, is of another consideration; upon which foundation this *probate* stands, being obtained from the

[288] plaintiff by fraud upon him a weak man, and since found to be a lunatic, by the defendants own acts, subsequent to the death of the testator. The method of doing which was found on an agreement containing a covenant for the plaintiff's doing all acts demanded of him by *Powel*; in consequence of which a special proxy under hand and seal was obtained from him, confessing the allegations; upon which sentence was pronounced of *probate* to the defendants the executors. This *probate* depends on that deed; and is any thing more proper for this court to enquire into and set aside for fraud, if proved, than such a deed? If a warrant of attorney to

confess judgment was obtained from him, though I will not say the common law courts could not set it aside; yet a bill might be brought here in cases, where they could not. (n) This then is a ground of jurisdiction in this court distinct from the will itself. I will not take upon me to deny, that the *ecclesiastical* court has jurisdiction in some instances, to inquire into and correct the *mal practice* of their proctors: as if by undue practice of theirs the proxy is obtained from their client, the *ecclesiastical* court might inquire into, pursue, censure, and perhaps make the act void: but that is a different consideration; all the practice being between the parties interested, with which the proctor had nothing to do. And I am of opinion (with deference to any determination that hereafter may be) that such proxy under hand and seal, importing a consent to the *probate* of a will, is not in the power of the *ecclesiastical* court to set aside: for they must do it by inquiring, whether that deed was obtained by fraud or imposition, or not; which, if they did, the courts of common law would prohibit them, and say they had no jurisdiction to determine concerning the validity of a deed under hand and seal, which belonged to the temporal courts, whether well executed or properly obtained. In the time of *Parker*, Chief Justice, there was a suit for the distribution of the surplus of personal estate, and in the *ecclesiastical* court it was insisted, there ought to be an intestacy *quoad hoc*, the executor having a legacy: the executor applied to *B. R.* for a prohibition, which was granted, on the foundation that the *ecclesiastical* court was to determine according to the rules of their law; and this was the jurisdiction of courts of equity; which does not indeed come up to the present, but goes so far as to shew, that the *ecclesiastical* court cannot determine property on the foundation of equity. This deed of proxy therefore is a distinct foundation to entitle this court to proceed some way or other concerning this *probate*, abstracted from the general jurisdiction of the *ecclesiastical* court to determine of a will of personal estate. As to the absurdity argued in allowing the *probate* to stand, and yet determining the will forged; there is some appearance for that, for allowing the *probate* must be on the foundation, that the will is good: but that will not conclude so far, as that this court should not take proper methods to come at it, without sending the parties to the *ecclesiastical* court to litigate all this again. Several cases [289] wherein by reason of the ill practice of defendant, as in the case of spoliation it is admitted, a court of equity will take from them benefits, they would otherwise be intitled to: as to decree them trustees, and to direct conveyance to set matters right: though this court cannot set aside a judgment of a common law court obtained against conscience, yet will it decree the party to acknowledge satisfaction on that judgment, though he has received nothing: because obtained where nothing was due: so it cannot set aside a fine for being obtained by fraud and imposition, as the court of *C. B.* to a certain degree and with some restriction may: yet on a conveyance so obtained, this court never sent the plaintiff to *C. B.* to set it aside; but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to reconvey on the general ground of laying hold of the ill conscience of the party, to make him do what is necessary to restore matters as before. Why not in the present case also, as far as it can be done? If it is to be said, that in every case of a forged will

proved in the *ecclesiastical* court, not on proofs, but on fraud and imposition upon the next of kin, if this court is bound to send it to the *ecclesiastical* court, it would give a great advantage to such ill practisers, in letting them have the chance of the plaintiff's witnesses dying before they can get through such a litigation; and a great disadvantage to the other side, as it is a worse kind of proof than the examination *viva voce*, which I will prevent if I can; and am strictly warranted to set it aside, and to relieve the plaintiff against that and the deed of proxy, the foundation of the sentence, which then stands without any foundation (*o*); and, if no more in this case, I would go to the utmost to decree the defendants trustees.

But the last objection creates some difficulty, *viz.* the prior will found among the number of papers; like the rest, of the testator's hand-writing and signed by him; by which the whole personal estate, except some legacies, is given to *Powel*, but no devise of the real estate; which, if a true will, is now the last will; which, whether it be or not, I cannot direct an issue; and it is subject to several questions proper in the *ecclesiastical* court, whether a perfect or complete instrument; which if it comes out to be a will, it would be a contradiction thereto now to decree the defendants to be trustees.

The method occurring to me is; like decreeing consent by counsel to a motion in *C. B.* to set aside a judgment next term, to decree (upon the principle of laying hold of the evil conscience of the parties, and the jurisdiction I have over these deeds) the defendants to consent in the *ecclesiastical* court next term to a revocation of that *probate*, which will [290] be then set aside and out of the case; and things will be in their proper state, without interfering with any jurisdiction: but as to going farther, and granting administration to the plaintiff *de novo*, this prior will must be first set out of the case: therefore the defendant *Powel* shall have a fortnight's time after such revocation, to propound and exhibit that paper-writing in the *ecclesiastical* court, and to prosecute it with effect, which if he does not, I will decree both defendants to consent to the granting administration to the plaintiff.

And then I think I ought to go farther: and although I shall not yet decree a trust, yet even now shall be warranted to decree an account of the personal estate, to be paid into the bank, for the benefit of the parties intitled; which for security was done in *Powis v. Andrews*: and the present case from all the ill practice that has been, is stronger than that. This is the better method, to avoid any jealousy of infringing on the *ecclesiastical* court.

The plaintiff is intitled to costs in law and equity against both defendants; for in such a scene of iniquity and combination, though one more guilty than another, the court never distinguishes, but charges all together.

It being then insisted for the plaintiff, that the court ought to direct no examination of the said paper-writing, but grant a perpetual injunction, from the circumstances of it being produced and found with the forged will, and its reciting a forged deed.

Lord Chancellor thought, this would be a very good defence in the *ecclesiastical* court, as they were circumstances of suspicion: but that it would be going too far to say, that because of ill practice in one will, he should have no right as to another.

LOMAX v. HOLMDEN, July 22, 1749.

(Reg. Lib. 1748. B. fol. 455.)

Second born son may take under a limitation "to the first son," he being so at the time (1). Where a remainder limited to first son may be taken by a second under that description (1).

Wills in general construed from the making; unless circumstances or the tenor of it shews it should be from death of testator; but the intermediate time not regarded.

THIS came before the court on the petition of *Caleb Lomax (p)*, to have the deeds and writings relating to the real estate delivered up to him: which depended on the question, whether he had an estate of inheritance, or for life only, under the will of his grandfather *Joshua* made December 9, 1720? *Joshua* had then but one son *Caleb*, who had disoblged him, and four daughters, and a grandson by a deceased daughter: he devised his real estate to *Graves Norton* on trust to permit his wife to receive and take the rents and profits during life, without impeachment of waste; she paying thereout £200 *per ann.* by eight equal payments to his son *Caleb*; and after her death to permit his four daughters and [291] grandson, their heirs and assigns, to receive the rents and profits to their own use, till his son *Caleb* should attain forty years of age, hoping then he would become sensible of his folly: and then to the use of *Caleb* for life, without impeachment of waste: then on trust to support contingent remainders: and after his decease, to the use of the first son of the body of *Caleb* lawfully begotten, and the heirs of the body of such first son: and for want of such issue, to second, third, and fourth, lawfully begotten successively in remainder one after another; and for want of such issue, to the use of his four daughters and grandson, their heirs and assigns for ever, as tenants in common, not as joint-tenants, chargeable nevertheless with £8000 to the daughters of *Caleb*, equally to be divided among them.

Caleb had married about two months before the date of the will; he had a son born afterward, who died soon, and in the life of testator; afterward he had another son, the present plaintiff.

For whom it was argued, that the intention was not to give it over to the daughters but in failure of the sons and their issue; which gives them an estate-tail. There is no reason to distinguish the second, third, and fourth son from the first; *Caleb* not then having any child who could be the particular object of the testator: whose view was to make a strict settlement of his estate in his family; and such a strange provision as a successive series of estates for life was never heard of in a family settlement. It is drawn by the testator himself; and wherever he intended an estate for life he has shewn, he knew how to express it properly. *Langley v. Baldwin*, (cited in 1 P. Wms. 50) shews an express estate may be altered by implication; and the words here warrant the court to infer such an intention; nor is there any rule of law or authority against it: for all the cases prove, that no want of words is fatal, if from the whole the intent can be collected to the satisfaction of the court; no artificial form of words

(p) 3 P. Wms. 179. 3 Burr. 1570.

(1) See *Emery v. England*, 3 Ves. 232.

being required to express it. So that the testator having omitted words, upon which to graft the limitation of heirs of the body after the limitation to second, third, and fourth, it may be supplied, as it may be abridged or enlarged according to the intent from the whole context: which governs the whole, as *Swin.* says, who puts a case, where the word *executor* is supplied, the testator having only said, "I make my wife my of this will." There are several cases stronger than the present, where the whole context prevails against express words; and the stronger, as being old cases, when the courts went by the strictest rules, having since used greater latitude to answer the intent, which has been made good even where there were no words of gift. Wherever an estate is given over for want of issue, it is an estate-tail: and applying it either to want of issue of the second, third, and fourth son, or to *Caleb* the father, either way will give an estate-tail: for the plaintiff may take a remainder in [292] tail by implication as heir of the body of his father. Instead of repeating the limitation in tail given to the first son, the testator affected a kind of brevity; as appears from his omitting the article *the* before second, third, and fourth; but he designed the same. He could not intend to leave the male-issue of *Caleb* unprovided for, and yet leave a provision for the daughters; nor is this going farther than was done in *Langley v. Baldwin*, to preserve the interest of a seventh son; although the plaintiff is not the first born son, he is to be considered as the first son, capable of taking at the time the will speaks; which is from the death of the testator with respect to the devisee: although as to the capacity of the testator to dispose, and the subject matter of the devise, it is from the making the will. He speaks only as to those who shall survive him: and by the death of the elder brother, he was out of the case, as if never in being; which was the ground of Lord *Talbot's* determination in *Hopkins v. Hopkins*. [*Cas. Talb.* 44]. That *first born* is synonymous with, and means *eldest*, appears from the case of the *Duchy of Cornwall*, printed by itself in 1613: where it was held, that *Henry*, the first born of king *James I.* being dead, *Charles* the II. born, might take that duchy as *primogenitus*, which agrees with *Selden*, part 2. 778.

Against which it was insisted, the question was merely legal; arising on a vested use, not on articles, or any thing executory; therefore not to receive a different determination from what it would receive in courts of law. First, whether he can take an estate-tail under the description of *first son*? The intent is indeed the guide; but still it is limited within the words of the will, and must appear from them: and it would be a contradiction to the words to say, the plaintiff is the first born, when he is admitted not to have been so. And though there is a difference between grants and wills, as no technical form of words are required in the latter, yet still some words proper to carry the limitation beyond an estate for life must be used, or the court will not raise it by construction. There must be words in the will to support the intent and the words of *Powel, J.* in *Salk.* 227, against enlarging the exposition of wills are material. *First* and *second* are here mentioned in priority of birth; and not like the case of portions, where *elder* has been considered as *younger*, &c. The *Prince's* case is a settlement made by act of parliament for particular purposes, and in nature of a peerage; so that the construction is different from common cases. *First born son* is a good name of purchase, because always certain; and then the

second cannot be him; to help this it is said, wills speak from the death of testator: but that subsequent accident could not have been the view; nor has he used words to that purpose. In general, wills speak from the making; so that lands purchased afterward pass not thereby. In *Hopkins v. Hopkins*, (1), the time of making alone was to be material as to the construction of the testator's meaning: though as to the [293] manner of taking, whether by an executory devise, or contingent remainder, it spoke according to the accidents at the time of the death. If the first son had survived the testator, the plaintiff could not have taken as the first; and if the first son here had left issue, though according to *Bret v. Rigden*, *Plow.* that issue could not take, because the father could not; the plaintiff would then have taken as second son, and then he could not at the same time take as first and second. *Trafford v. Ashton*, 2 *Vern.* 660, proves, that *second son* is taken in the common acceptance, unless the contrary shewn; next whether he can take an estate-tail, from the words and the intent? The words do not give it, therefore if at all, it must be by implication, which according to *Vaug.* must be a necessary implication, and not so here; for a life estate will answer. *Issue* means *sons*; is a word of purchase and description merely; and then cannot operate by limitation also; nor can they take one after another, or in a course of succession, if they or *Caleb* take an estate-tail. Nor will the court supply a defect of words in the present case.

Lord Chancellor having taken time to consider it, now delivered his opinion.

There are two points to be attended to; first, whether the plaintiff can take an estate-tail, as the person designed and described by the name of the first son of the body of *Caleb*, lawfully begotten? For if so, there are clear words to that purpose. The second, if he cannot, whether he can take an estate-tail by the remainder to the second son, upon construction of all the parts of the will taken together? which lays the third point, whether he might not take a remainder in tail by implication as heir of the body of his father, out of the case?

On the first point I am of opinion, the plaintiff may well take an estate-tail. I admit it is no trust; and therefore a question of law, and to be determined by the same manner and rules as at law upon an ejectment, if it had been or could be brought. But still it is a question of a will; and the construction I make is warranted by the intent of the testator, and the legal exposition of the words. The intent is best collected from the circumstances; and it appears, he intended to confine his resentment to *Caleb*, and not to disinherit his issue, who could not have offended him. Which view however imperfectly expressed, appears from the whole tenor; especially from his charging the remainder to his daughters, with £8000 to the daughters of *Caleb*; for it is not to be conceived, that he would not have made some provision for the sons, if he had not supposed he had done it before: whereas by the other construction, in default of heirs-male of the body of the first son, all the others were to be but tenants for life; and their sons to have nothing; to prevent which, there is no way but by construing the grandsons tenants in tail, if consistent with the rule of law. [294]

Then as to the words: for whatever the intention, if there are

(1) Forr. 44. 1 Atk. 581. Mr. Sanders' edit. and ante, 268.

not words in the will to warrant it, either expressed or implied, it cannot have effect.

The first objection to the plaintiff's being included in the description of *first son of the body of Caleb* is, that *first* is the same with *primogenitus*, which the plaintiff is not, being in fact the second born. A second objection is, that though the plaintiff was eldest at death of the testator, that is not sufficient; for the will must be taken to speak as at the making. A third objection is, that if *primogenitus* may be applied to the second, yet it cannot in this will: because the express limitation to the second son is put in opposition to the first: and the same person cannot be considered as both.

As to the first objection, I cannot quite agree, that *first son* is to be always taken strictly in the sense of *primogenitus*; but in the sense of an elder son, *senior* or *maximus natu*. For suppose a settlement by act executed in the life of grantor limits the estate to *A.* with contingent remainder to his first son; *A.* had a son, who died without issue before the making that settlement: yet a second son born afterwards might take the remainder by that description; nor would the intent be considered to have been to limit it to a person dead at the time of making. Had the words been *to be begotten*, that would clearly have described an after-born son; and it is admitted, those are the same with *begotten*. But supposing it strictly the same as *primogenitus*, yet might the second properly come within that description; for which purpose the case of the *Duchy of Cornwall* is direct: that the eldest son of the King of England (and therefore *Richard II.* required a special grant) takes it as *primogenitus*: although *Lord Coke*, at the end of the *Prince's* case, 8 Co. says otherwise. But that was not the point there, being only an observation of his own, and has ever since been held a mistake of that great man. He was also mistaken in the fact, in saying that *Henry VIII.* was not Duke of *Cornwall*, because not *primogenitus*; for *Lord Bacon* in his history of *Henry VII.* affirms the contrary, that the dukedom devolved to him upon the death of *Arthur*: and this is by a great lawyer, and whomust have looked into it, as he was then *Attorney or Solicitor-General*. So was *Edward VI.* in his father's life, without a new creation, although the king's second son. *Lord Ellesmere* in his printed observations upon *Lord Coke* says, with some warmth, that *Lord Coke* split on this rock, in restraining it to *primogenitus*, and not to the first *pro tempore*, voluntarily, without any occasion, or the concurrence of any judge. *Seldon* in his *Titles of Honour*, 6 vol. 776, says, the eldest sons living are also Dukes of *Cornwall*; and that *Prince Charles* was Duke on the death of his brother, appears from the records, *Rym. Fæd. tom. 16, 792*, he is so described in the patent creating him *Prince of Wales*. There is no act of parliament afterward, in the time of *James I.* creating him Duke: nor can any doubt arise (as I at first thought) of his right thereto under the charter of *11 Edward III.* from the act of *James I.* enabling him to lease part of the *Duchy* lands; several acts being passed to enable the dukes for the time being so to do. Nor is it a satisfactory answer, that that case was founded on an act of parliament made on political views, and so different from the rules of common law: for the difference of that case from others, is in the nature and form of the limitation of the kind of estates to be taken in the *Duchy*, not in the persons to take. But I own, I should not be

quite satisfied to found on my opinion upon this, for political reasons might have some weight. But this determination happens to be strictly agreeable to the rules of law, in cases of common persons: as appears from *Fitzherbert's Nat. Brev.* 188, on the writ *de auxilio ad filium militem faciendum*; where he says, that *primogenitus* then alive is sufficient, which is agreeable to Lord *Ellesmere's* observation; that *Charles* became *primogenitus* on the death of his brother without issue, which circumstance concurs here; for issue are considered as part of their father. This is an original writ; where the phrase and language of the law is most critical and precise, and has been always construed with great strictness; and as it supports the intention of the testator, it is some satisfaction to find it warranted by the most respected authority, as that is. I have been furnished with the original case of the *Dutchy* printed in 1613, which is very scarce, where it appears to have been by the greatest men, with full assent of council, and the reasons of the resolution at large; and *Fitzherbert's Nat. Brev.* is expressly mentioned and relied on there.

As to the second objection, it must be admitted, the general rule in the construing wills is (q), that the time of making, not of the death of the testator, is to be regarded. *Swin. part 7. chap. 11.* who goes farther: his method being first to lay down the rule, then the extension, then the limitations thereon; and he instances in the case of a legacy to the children of a person, who at the making the will had but four, and afterward several others: if no more in the case, the four are to have it among them; which though true in general, yet several cases occur, where according to the circumstances and tenor of the whole, it shall go among all the children at his death; which limitation holds strongly here; for it is impossible the testator should mean *primogenitus* in being at the making the will, as he had none then; therefore he must mean a son born in *futuro*, and then it is absurd, and not to be presumed, he meant a son born afterward, who should die in his life. The making and the death, [296] not the intermediate time, are only to be regarded in construing wills. If the testator could not mean the time of making, he must mean the time of his death, when the instrument would be complete. *Hopkins v. Hopkins*, in 1724, went rather farther than this: for there the devisee, upon whose death without issue-male a contingent remainder was given to the next son, was alive and named by the testator at the making of the will; which the testator had before his eyes, and that he might survive the testator, and take the estate intended him: yet because he was not alive at the death of the testator, the court referred the construction of the will to that time, turned it into an executory devise, and let the profits of the estate descend in mean time to the heir at law: which was not only a deviation from the technical form of the devise, but an alteration in substance, carrying the mesne profits in a different channel from what was intended.

The third objection is answered, by what I said before; for if it is to be taken as a description of *first son who should be in being at his death*, the supposed repugnancy is taken away. But the case in *Fitzherbert's Nat. Brev.* proves there is no repugnancy: for the same person may be *primo-*

(q) A will speaks at different time for different purposes, to many purposes from the date, to others from the testator's death, per Lord *Manfield*. *Durnf. and East*, 438, note.

genitus and *secundus filius*, and may be described either way; though he is in the order of nature *secundus*, yet taking the term *first begotten* relative to any particular time, as here at the death of the testator, he is *primogenitus*.

On the second point I incline to think, the plaintiff might by that limitation take an estate tail; at least a great deal may be, and has been said, reasonable to maintain it; from the omission of the article *the*, and the short phrases used by the testator; and from the latitude which may not unnaturally be taken in expounding the word (*successively*) *secundum subjectam materiam*, as that word is capable of a larger meaning, especially when applied to an estate in a family, and especially from the subsequent words in the limitation to the daughters upon the death without issue; for they must be referred to the issue of some person. Nor has the testator said in words, whose son the second, third, and fourth, should be; nor for want of whose issue the limitation over: which should be therefore supplied. But as I am opinion, the plaintiff is tenant in tail on the first point, so that the deeds and writings must be delivered to him, it is unnecessary to give any on that; and I choose to avoid it, as it would be, entering into a large field, and as it is more prudent for judges to avoid the making decisions upon nice refined distinctions.

[297]

SEWELL v. BRIDGE, July 24, 1749.

(Reg. Lib. 1748. B. fol. 396.)

Plea of a general agreement and composition of accounts (1) good, without its being a minute strict settlement of items.

PLEA, that pending suit the parties come to composition; the general objection to which was, that because there was no particular account by *items*, it ought not to stand.

LORD CHANCELLOR.

The objection to this plea is upon a principle I can never admit: for the consequence would be to say, that a long, stale and various transaction could not be put an end to without a minute account, which would create endless suits: nor has a subsequent discovery set aside or opened such accounts; as was denied to be done by Lord King; if indeed it had been a strict account entered into, it might be otherwise upon a new discovery (1).

(1) Vide ante, 37. Postea, 2 Vol. 482. 565.

TAYLOR v. BEECH, July 24, 1749.

Plea of statute of frauds to discovery of a parol agreement not allowed where part performance (1).

PREVIOUS to the defendant's marriage, £500, the property of the (r)
(r) Ante, 83. Post, 441. Prec. Chan. 526. 1 P. Wms. 618. Stra. 236.

(1) See Ante, 83. Post, 441. Clerk v. Wright, 1 Atk. 12. Lacum v. Martins, 3 Atk.

wife by a former marriage, was agreed to be assigned to trustees for her separate use during coverture: and to be applied after her death, to such uses as she should appoint: and for want of appointment, to her executors and administrators: to carry which agreement into execution, they sent to an agent to prepare the writing; but he being then out of the way they were married before the agent (s) could carry it finally into execution. A proper draft of assignment was afterwards prepared: in which alterations were made by the husband's own hand-writing, who on delivering it to the wife told her he had made no other alteration, than was for her benefit; and suffered her to receive it to her separate use during coverture.

The wife by will gave the £500 to the plaintiffs, who brought this bill for it.

The defendant pleaded the statute of frauds on foundation of the agreement not being reduced into writing, as a good bar to the discovery of any parol agreement, as well as to the relief; averring that neither he, nor any one for him, upon or previous to the marriage, reduced it into writing.

LORD CHANCELLOR.

There is no colour for this plea; which is informal: *upon or* [298] *previous to* is no denial; for it is a good agreement, if afterward signed by him. Although the statute of frauds is a protection against the defendant's making a discovery of a parol agreement, and therefore it may be pleaded as well to the discovery as relief, yet that rule extends not to facts subsequent, viz. shewing a part performance; in which the statute cannot be pleaded (1). Although it is true, that in the case of marriage agreements it is otherwise: though it is not mere marriage occasions that, without something else. But here are strong circumstances subsequent to the agreement, which go a great way to take it out of the statute; and if the statute is suffered to be pleaded to the discovery even of a parol agreement in such a case, it would be very mischievous. Let the plea therefore be over-ruled: but without prejudice to the defendant's insisting on the statute by answer.

But Lord Chancellor afterward ordered that clause *without prejudice*, &c. to be struck out: saying he did not know that it had been so directed upon a plea of the statute of frauds; although it had on a plea of the statute of limitations.

4. *Whitbread v. Brockhurst*, 1 Bro. 404. and the various cases therein cited. See also Mr. Raithby's notes, 1 Vern. 160, n. 2. "If however the defendant by answer admits the agreement, but insists upon the benefit of the statute, there is no occasion to inquire about part performance—the statute protects him." Per Lord Eldon, C. in *Cook v. Jackson*, 6 Ves. 39.

(s) In 1 Atk. 12, such a plea allowed, as no part of the agreement was performed.

(1) See however the distinction, 6 Ves. 39. referred to by the preceding note.

Ex parte OTTO LEWIS, August 2, 1749.

One found *non compos* before the senate of *Hamburgh*, a mortgagee within *st. 4. G. 2. c. 10.* and will be directed to convey.

PETITION, grounded on the statute 4 G. 2 c. 10. that a lunatic heir of a mortgagee might be directed to convey to the mortgagee.

As no commission of lunacy was taken out, *Lord Chancellor* was in doubt whether in general he could make such order, the words of the act being that "all persons being lunatic, or the committee of such persons, shall convey." But in this case there having been a proceeding before a proper jurisdiction, the senate of *Hamburgh*, where he resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, which proceeding the court was obliged to take notice of, he declared, he was a mortgagee within the act, and ordered, that on payment of the mortgage money there should be a conveyance to the mortgagor. *Ex Relatione.*

HEARLE v. GREENBANK, August 3, 1749.

(Reg. Lib. 1748. A. fol. 693.)

J. C. 3 *Atk.* 695. *Quod vide.*—Infancy—Power—Coverture—*A.* devises in trust for sole and separate use of his daughter (a feme covert) for life, and to be at her own disposal, with power notwithstanding coverture to dispose thereof. She when nineteen, in pursuance of her power, disposes of it by will: this not a good execution of the power as to the real estate, which may be claimed by the heir at law, although at the same time claiming a legacy; nor is the husband intitled to be tenant by curtesy (1).

Infant at seventeen may devise personal estate. Feme covert may dispose of her separate estate (2).

A power given generally cannot be executed by infant (3). What powers infant may execute.

Power coupled with an interest, different from a naked power.

A will void as to land: heir at law may notwithstanding claim a legacy.

There must be a seisin in law or equity to intitle husband to be tenant by curtesy.

Interest—Where the court will or will not give interest for legacy before payable.

(4) THIS cause came before the court in two bills: the original by the plaintiffs as devisees and residuary legatees of *Mary Winsmore*, wife of *William Winsmore*, a bankrupt, to have an appointment made by her of a real estate, devised to her by her father *Doctor Worth*, established; and that the executors might account with the plaintiffs for the real and personal estate of *Doctor Worth*, after raising £8000 and other legacies, bequeathed by the will of *Mary Winsmore*: and that *Mary Winsmore* [299] the infant might convey the freehold, copyhold, and leasehold estate to them.

The cross bill was brought by the assignees, under the commission of bankruptcy against *William Winsmore*, that they, as standing in his place,

(5) 1 Brown, 147.

(1) See *Shaddon v. Goodrich*, 8 Ves. 481.

(2) *Vide ante*, 163. Post, 517. 518. 2 Vol. 75. 190. and 3 Ves. 438.

(3) See 9 Ves. 471.

might have the benefit of every thing which *Mary Winsmore* was intitled to, as belonging to her husband, and to have an account of the freehold, copyhold and leasehold estate of *Doctor Worth*, and of the real and personal estate of *Dorothy Price*: and that if the legal interest of the leasehold estate remained in any of the parties, they should convey it to the assignees.

Doctor Worth had an only daughter about sixteen or seventeen years of age. *William Winsmore* in *December, 1739*, married her clandestinely, without the consent of her father, who was offended with her; but, as she was young, was more offended with the husband, who made her believe he was a man of fortune; and in like manner imposed on her father, and got from him about £1400 which *Mary* was intitled to from her aunt *Dorothy Price*. Within three months after the marriage, a commission of bankruptcy issued against the husband; and in *June 1741*, *Mary* the infant was born.

August 1742, *Doctor Worth* made his will, and died: thereby giving some legacies and charities, he devised his freehold, copyhold, and real estate whatsoever and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators and assigns in trust, to apply the residue, after paying their own charges, to the sole and proper use of his daughter *Mary Winsmore* during her life, and to be at her disposal, and not subject to the debts or controul of her husband; her receipts to be good; and to permit her deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold and leasehold estate, as she shall think fit; she having a particular regard to his poor relations in *Cornwall*: and gave to the same trustees, whom he made joint executors, his personal estate in trust for the sole and separate use of *Mary Winsmore*, and to be at her disposal, and not subject to the debts or controul of her husband.

October 1742, *Mary Winsmore* then under the age of 21, though above 17, after the husband's bankruptcy, and living separate from him, made her will; [See 3 *Atk.* 697.] and thereby in pursuance of her power in her father's will, gave to her daughter *Mary* £100 per ann. till she attain the age of ten, and after that £150 per ann. till twenty-one: these sums to be applied for her maintenance and education, and gave her £8000 to be paid her when she attains twenty-one; but if she died before twenty-one without issue of her body living at her death, she gave the £8000 to [300] two other persons, viz. *Hearle*, one of the plaintiffs in the original cause, and *Henry Worth*, to be paid within ten months after the decease of her daughter: she then gave legacies to some poor relations; appointing the two trustees in her father's will, and two others joint executors, guardians and trustees to her daughter: then devised the residue of her real and personal estate to the plaintiffs, the two *Hearles*, their heirs, executors and administrators for ever, as tenants in common, not as joint-tenants, charged as aforesaid.

Mary Winsmore had four kinds of estates; first, a leasehold, originally of ninety years under a church-lease, to which she was clearly intitled under her father's marriage-settlement; but the term expired; and when it was to be renewed by the Dean and Chapter of *Worcester*, it was made a lease for three lives: next a personal estate, coming to her from her aunt *Price*; and some copyholds which were admitted to be considered by the

custom of the manor as chattel interests: thirdly, the personal estate of her father: fourthly, his real estate.

For the infant daughter, [defendant (1).] Wherever the inability of infancy prevents the alienation of land by virtue of ownership, it prevents an indirect alienation by a power; because, it is a natural inability, from want of discretion. Before the statute of uses, all these powers were merely uses; and where a person could not alien the estate at law, he could not alien the use in equity, which followed the law: so that if he could not do it by feoffment, he could not convey the use of it: but where by custom he could sooner pass it, that incapacity determines sooner, and he might sooner dispose of the use. This court never establishes general rules contrary to the rules of the common or statute law; and before the statute of uses, never suffered an infant to pass the use, where he could not do it by law. By the statute of use, these powers got into the common law, and are moulded in it: the first power was by the statute of *H. 8.* to tenant in tail to make leases, which would bind the remainder-man and issue in tail. That statute does not say *tenant in tail of full age*; and yet there is no doubt, whether tenant in tail within age under that statute could execute the power of making leases. Then the statute of wills, giving power to every person having land to devise, does not say every person of full age; but the law operates on that power given, and says, no person disabled shall devise: therefore no person under twenty-one can, it being considered as the same as the inability of a person *non compos*. In *Sid. 162*, it is held, that an infant making a will, living after twenty-one, and not revoking, it was not a good will, nor to be read as evidence to a jury. In most families the settlements are as strict as the law will admit, and a power given to every tenant for life to make leases or jointures: and in none of these cases was it ever held, that an infant [301] under that power make a good one: and this happening every day and never done, is a good argument that it cannot be done: according to *Co. Lit.* this is to be distinguished from the case of making a valid jointure by a power from agreements of infants in consideration of marriage; which the court will, because reciprocal, carry into execution, or at least let the party refusing have no benefit of it. Several acts of parliament have been purposely made to enable infants to make jointures; and yet in none of these settlements is the ability of age expressed, but implied. It is a positive rule of law, that till twenty-one he shall be to this purpose as of a month old only: so that such a power to an infant would not be good, though by express words: although the law to some purposes distinguishes his age, which might be from the *Eccelesiastical* law; it never having been implied in the power given by statute or settlement; if it can be, there must be very strong words for it. And considering the circumstances of the daughter at the time, and that this is only a power out of the ownership, the father, supposing he could give that power to the infant over his estate, could never intend it: his only view was to make her a feme sole; it being all in opposition to her husband. There is a distinction between the inability of a feme covert, and of infancy; which is natural inability; not so of the other. If she, being a lunatic had done it, that would be void; so of infancy: this will cannot be read in

(1) See the arguments rather more fully, 3 Atk. 698, &c.

evidence to a jury, who must return *no devise*; then this court cannot make it good. But then supposing the will void: whether the plaintiffs who claim the real estate subject to the legacies, are not intitled to put the defendant the infant to her election, whether she will claim the legacy of £8000 or the lands by descent; upon the rule of not disputing a will in any part, under which you claim? That rule is true, properly understood, viz. that wherever a person claims under a will, and by the same will (properly executed) land or any thing else is devised to another, which the testator had not a title to, the person claiming under the will shall not dispute that title; the will manifesting his intent how the whole should go: but that rule does not go to make good no will; which is the present case, and not of a will impeached for want of title in the testator; this being like a devise to a charitable use, since the statute, for a want of capacity in the testator, is not want of title. Another question is, with the assignees of the husband; that his wife being seized in fee, and he having a child by her, is intitled to be tenant by *curtesy*, and that they stand in his place: there may indeed be tenant by *curtesy* of a trust: and in *Cashburn v. English* (1), his lordship determined a tenancy by *curtesy* of money, to be laid out in land: but that will not affect the present case; for as it is a direction of the trust of an estate, the rule of law is to be followed. Where the legal estate executed would make the husband tenant by *curtesy*, he shall be so: but the court will not do it, wherever the intent of the declaration of trust is, that the hus- [302] band's right to be tenant by *curtesy* shall be excluded: because if the trustees were to execute it, they must exclude his right recording to the intent; which here is, that he should have no interest in it. There are two strong cases for this, *Sands v. Dixwell*, where from the intent of the parties to exclude tenancy by *curtesy*, his Lordship turned words of limitation into words of purchase, to preserve the intent: But *Bennet v. Davis*, 2 P. Wms. 316, is still stronger. Another question is, as to the interest of the £8000, which being a gift to a child, she is entitled to interest even before the time of payment: and as to the personal estate of the aunt, the assignees cannot come at it in equity, without making a provision for the child.

For plaintiffs. As to the interest of the £8000, a particular maintenance being given, not out of the interest of the £8000, but being a general gift out of the bulk of the estate, it takes off the presumption, that in the mean time interest shall go for the benefit of the infant, for whose benefit there is no occasion to presume it was intended to accumulate, because the time is postponed with regard to the circumstances of the infant, to whom it is given; not for the representatives, who could not be in view: the persons regarded were the plaintiffs, to whom all the residue is given. As to the devising the estate itself, it depends on two questions: whether it was the intent of the testator, that she should have this power during her infancy? And if he intended, and so expressed it, whether in law or equity it can have effect? The circumstances at making the will are certainly proper to be considered; and the testator had a point in view, which could not be answered but by giving her power to receive the profits immediately after his death, and then it must be to dispose of it also; the point in view being to keep every thing out of the husband's

power; nor is there any thing to prevent this intent from taking place. An infant may present to a church; may do this, as well as declare the uses of a fine and recovery; and may by custom at a certain age make a conveyance, and the law will ingraft on such custom, and carry it further: as appears from Lord *Buckhurst's* case, *Moor* 512. who puts the case of an infant's having power to make a feoffment by custom, and making a feoffment to the uses of his will; that, though void as a will, because of his infancy, shall serve as a declaration of the uses of the feoffment; which is not to be distinguished from the present case. If indeed this does not operate by way of execution of a power, but as disposing of her interest, it would not be good: but it operates by the power, as she recited it; and the rule of law is, that where there are two ways of doing the same thing, if it cannot by one, it shall by the other. Sir *Edward Clere's* case, 6 Co. 17 b. determined in *Rich v. Beaumont*, in the *House of Lords*, that a feme covert may execute such a power (1).

[303] Then why may not an infant of the age of discretion? The disability of an infant is not a natural disability, because it is by a positive law; and then the same rule of justice affecting one positive disability will affect another: and the disability of a feme covert is stronger than that of infancy; for to an action upon a bond she may plead *non est factum*; an infant must plead *infancy, sic non est factum*. If it is asked, at what age an infant may do this? The answer is, whenever he is capable of doing it. In this case no doubt or nicety; the infant being above nineteen; having as much discretion as if she had lived two years longer; and this court will judge of the personal discretion of the infant. But one *non compos* cannot execute any power, as to act as an attorney, &c. because he has no mind. Where an infant acts in *auter droit*, he is capable of acting, not hurting himself; it being the fault of the party trusting him; so that an infant executor may sell under a power by the will. But if this execution, and so the will, is bad, yet have the plaintiffs a ground in equity, that the estate shall go according to the will, from the defendant's claim of a legacy of £8000 under the will; as in *Noy's v. Mordaunt* (2). The £8000 cannot be claimed but under that will; which cannot indeed be read as to the giving the estate itself, supposing it does not pass thereby; but as to the intent of the condition of performing the other part, it may be read. As to the tenancy by *curtesy*, the plaintiffs are thereby affected, and there is no ground for it, so that there must be a seisin in possession.

The cause was heard last *May*; and involving several material points, Lord Chancellor took time to consider of it, and now delivered his opinion.

As to the first kind of estate which *Mary Winsmore* had, being a freehold lease, her husband might be intitled thereto during her life; but upon her death it came to her daughter as special occupant: so that the husband is not intitled to be a tenant by *Curtesy* of it; and the assignees cannot claim it: nor can the power on Doctor *Worth's* will affect it, being taken as a purchaser. So that is to be laid out of the case, as neither the plaintiffs in the original or cross cause can claim it.

As to the personal estate of her father: it is given to her separate use;

(1) See also 4 Vin. Ab. 168. pl. 28. and S. C. Bro. P. C. 152. octavo edit.

(2) 2 Vern. 581,

in which case it is a rule of the court (u), that a feme covert may dispose of it: and this is clear of the objection made as to the real estate; because she was above the age of seventeen, at which age, if sole, she might make a will. Nay the books say, if above fourteen, the will is therefore a good appointment of the personal.

But as to the real estate, the principal question is, whether her will is a good execution of the power in her father's will? And upon this there are three questions. First, whether the power is [304] well executed? Secondly, whether the plaintiffs who claim the real estate subject to the legacies, are not intitled to put the infant to her election: and if she will take the £8000, whether she will be admitted in equity to contradict and defeat her mother's will as to the real estate? Thirdly, whether the bankrupt is intitled to be tenant by *curtesy*?

The first is a considerable question, and never determined, that I know of. I can find no case, where a power given generally can be executed by an infant: and therefore I will make none. As to the general question concerning powers, it must be admitted there are some kind of powers an infant may execute: as where he is a mere instrument or conduit pipe, where no prudence or discretion is required, or where his right is not affected. 1 *Inst.* 52. A. "Few persons are disabled to be private attornies to deliver seisin; for monks, infants, feme coverts, &c. may be attornies." As this opinion of Lord Coke is delivered it seems at first, as if he meant only to deliver seisin: which is merely a ministerial act: although the latter words are general. Yet he himself, 1 *Inst.* 128. A. says, that an infant cannot be an attorney: it is therefore pretty much undetermined, how far infants can be attornies, unless to deliver seisin or such a ministerial act. But that is different from these kind of powers. These powers over real estates, were introduced by the statute of uses; for before that they were done by way of condition; and as before the statute a man might execute a power over an use, so he may still. At common law an infant might have performed a condition; that is a condition for his benefit: so he might make a feoffment of part of it to J. S. or else to lose the whole estate. But, as to the other kind of powers to be executed by infants, I find no authority for it. An infant may undoubtedly present to a church, but he cannot execute this power in like manner. He may present by guardian, if only a month old: and the strong ground of that is, there is no inconvenience; because the bishop is to judge of the clerk's ability. The instances of fine and recovery are to be laid out of the case: the law allowing of infants declaring the uses thereon for want of remedy; for in the case of an infant's fine, during non-age, if *error* brought, and to be tried by inspection, it may be reversed: but if not reversed, the fine stands. And if the fine stands, the declaration of the uses is the same conveyance, and therefore that will stand; for on matter of record he is taken to be a person of full age, and none must be admitted to aver the contrary. No argument can be drawn from custom, custom differing from private powers given in general; custom is *Lex Loci*, and is always presumed to have a reasonable commencement; and such [305] a custom, that an infant at fifteen may make a feoffment, is the same as if a private act of parliament was made to give infants such a

(u) She being considered a feme sole as that, Post, 518. 2 Vol. 190, 75.

power. The case put by *Moor* has a semblance to the execution of a power: but was put only *arguendo* at the bar; he cited no case for it: nor can I find any authority to support it: the cases being rather to the contrary. 21 E. 4. 24. *B. Bro. Custom*, pl. 50, 2. *Roll. Ab.* 779, that if an infant makes a feoffment of *Gavelkind* land warranted by the custom, and it is to his own use, if he makes a will of the use, it is void; unless the custom will warrant it, the devise is not good, for the custom must be taken strictly. And in my apprehension this differs little from the case put by *Moor*; for before the statute of uses, one might devise the use, and the will would be a good direction for the use. If so that one, who has a feoffment to his own use, might devise, yet according to the case in *Roll. Ab.* the use there could not be devised by will: which is a direct contradiction to the case put by *Moor*, *arguendo*; and therefore I take that case now to be law. It is said, that a feme covert may execute a power; (which was so determined in *Rich v. Beaumont* upon the execution of a power, created before she was covert: and so in a case before Lord King) (1), so a power to a feme covert to make leases is good; and therefore why not this by an infant of the age of discretion? I take it in law (x), that the disability of an infant with respect to the real estate is more favoured and a stronger disability, than that of *feme coverts*. In *Hob.* 95, there are some cases put: and there is a marginal note very material. And here I will take notice, that the notes in *Hob.* are allowed to be his own. The note is this, "coverture was not at common law so far protected as infancy, and some other disabilities, as *sane memory*, &c." the ground of the disability being not from want of judgment, but from being under the power of her husband; she having as much judgment as if discover: this is the reason why she is examined upon suffering a recovery. But no examination of an infant to make his recovery good (y); his disability arising from want of judgment. I will mention some other cases. 1 *Inst.* 246, 403, that a woman disseisee marries; disseisor dies seized: that shall take away her entry after her husband's death, unless she was within age at the time of the marriage; for then no folly can be accounted in her in taking such husband, as would not enter before the descent. This shews, that the disability of an infant arises from want of judgment: in 10 Co. 43. *A. Mary Portington's* case, a common recovery against husband and wife is good; but not against an infant, who has not such a disposing power of the land as they have, but is *tout ousterment* disabled by law, to convey or transfer his inheritance or freehold during minority: but she is said here to be of as much discretion as if she had lived two years longer; and that the court will judge of the infant's personal discretion. This would be introductory of the utmost inconvenience, and a power with which I [306] should be very sorry to be trusted. There is a variety of opinions of people's ability and judgment; and in these cases it cannot be known till after the death of the party. The words of *Hob.* 225. are material, of a feoffment by an infant by custom, that in pleading,

(x) Money to be laid out in land by a private act of parliament, an infant cannot elect to take it as money. 2 *Brown*, 56.

(y) Infants bound if consent of their right. 2 Vol. 212. Infant bound to a fair and reasonable marriage settlement, but the covenants are not to be construed too strictly. 1 *Brown*, 152.

(1) *Lady Travel's* case. See the principal case in 3 *Atk.*

an age certain must be set down, and not left to the measuring a yard of cloth, &c. These general cases determine me in my opinion, that this cannot be good. Private acts of parliament have been made to enable infants to execute powers: as in *Sir Thomans Parkin's* case. I have searched, and the only case I can find, of a power executed by an infant is *Lord Kilmurry v. Dr. Gray* (generally cited for another purpose) which is cited, and more particularly stated in *Evelyn v. Evelyn*, 2 P. Wms. 659. I have sent for the decree; and it does look there, as if it was a power executed by an infant; but it was by virtue of a private act of parliament: I sent for that act of parliament, and there is an express clause to make good all acts to be done by him relating to the settlement by that act; which should notwithstanding his minority be as valid and effectual, as if at the time of making he was of full age. So that this is clearly a power arising from an act of parliament, and no colour of an authority for a general power. Taking it therefore in general, I am of opinion an infant cannot execute a power. But next it must be considered, whether any thing in this case is particularly to this purpose? and I think, there is. First upon the penning of the power: secondly, as it is a power coupled with an interest, and upon the penning there is a strong objection against her executing it during infancy; for the testator, having the coverture in view, has excluded that, giving her power to dispose, notwithstanding that, and would also have excluded the case of infancy, had he so intended; and then the rule is, *expressio unius exclusio alterius*. He might not think there was any occasion for giving her power during infancy, as she was then about nineteen; his plain view being to secure it from the husband's power, and that he might not induce or cajole her to part with it. Secondly, this is a power coupled with interest, and which is always considered different from naked powers. It was admitted, that if this execution was to operate on the estate of the infant, it might not be good (z); now it is clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the mean time: which would remain in herself, if not disposed of, and descend to her daughter: so that this is directly a power over her own inheritance, which cannot be executed by an infant.

As to the equity of the plaintiffs from the claim of the £8000 legacy: it is true it was determined in *Noys v. Mordaunt*, 2 Vern. 581. that if lands in fee are given to one child, and to another lands entailed, it is meant, they should release to each other; and the court has gone farther since, to the case of a personal legacy. But still I am of opinion, this differs from all those cases: and the infant is not obliged to make her election; for here [307] the will is void. And when the obligation arises from the insufficiency of the execution or invalidity of the will, there is no case, where the legatee is obliged to make an election (1); for there is no will of the land. A man devises a legacy out of land to his heir at law; and the land to another: the will is not well executed according to the statutes of *frauds* for the real estate: the court would not oblige the heir at law upon accepting

(z) Naked powers construed strictly, powers coupled with an interest liberally. 2 Vol. 79.

(1) *Aliter* if there be an express condition not to dispute the will. *Boughton v. Boughton*, 2 Vol. 12.

the legacy, to give up the land. This differs from *Noys v. Mordaunt* in the reason of the thing; there the testator devised some lands which were, and others which were not his own: and the court said, that the devisee should suffer the lands to pass, as if they were his own: but here, whether the lands were her own or not, they cannot pass by the will. Another distinction is, *Lord Keeper* there grounded his opinion upon the father's disposing his estate among his children; whereas here she had but one child, and disposes of her whole real-estate charged with legacies to the plaintiffs.

As to the claim by the assignees of the rents and profits during the bankrupt's life (a), I am of opinion, he is not intitled to be tenant by *curtesy*, upon the ground of the husband's having no seisin in law or equity. By the father's will the whole legal inheritance was vested in the trustees, and though said to be determined in *Casburn v. English*, that husband may be tenant by *curtesy* of a trust in equity; yet first the wife must have the inheritance: secondly, there must be a seisin of the freehold during the coverture. That the wife had the inheritance is true, and there was a kind of seisin; that is an equity; a trust of the profits for her life: but here the father, whose estate it was, has made his daughter a *feme sole*, giving her the profits during her life; but not subject to the controul of her husband. Then what seisin had the husband in equity during the coverture? and this is essential to a tenancy by *curtesy*, and would be directly contrary to the intent of the testator.

But as to the interest of the £8000, I am of opinion, the infant daughter is not intitled thereto till twenty-one. The general rule is, that a legacy payable at a certain time does not carry interest till the time of payment comes; for interest is given for delay of payment (1). If interest is given in mean time, the representative of the legatee shall recover the legacy immediately; but if not, the representatives shall not recover it, till the time when by computation the infant might have attained his age. The ground I go upon is, that in the cases, where the court has given interest in the mean time, it has been, where interest has been intended by way of maintenance. Here the testatrix has made another provision for the legatee's maintenance, and not to arise out of the interest; for then the argument would be stronger, that the legacy was intended to carry interest in the mean time: but it is given out of the general
[308] fund. Another thing is the contingency; which shews it was in her view that she might die before twenty-one. There are indeed several cases, where the court has given interest; as in *Asherty v. Vernon*; but there were particular reasons for it.

Next as to the aunt's personal estate a question has been started, whether, if the assignees are intitled thereto, (the husband gaining a matrimonial right, which survives to him, and cannot be affected by the power or appointment), they can claim it in equity, without being obliged to make a provision for the daughter? In *Jewson v. Moulson*, Mich. 16. G. 2. [2 Atk. 417.] I was of opinion, that the assignees have been compellable to make a settlement for a wife, where the husband had made none. But I

(a) Ante, 176.

(1) Ante, 119.

can find no case, where it has been done for a child: I do not say it cannot, but there are reasons here why it should not. It is a liberal discretion, which the court exercises in the case of a wife; and in this case the child is provided for, so that the court ought not to make this the first instance; for she is intitled to the real estate, and to £8000 out of the personal; which is a great provision; and the court will not make a stretch in equity in the case of a child thus provided for; and on the other hand fair creditors. But the £1400 paid by the Doctor to the bankrupt, must be considered as paid out of the personal estate of the aunt (2).

(2) The decree is stated accurately, 3 Atk. 717.

BECKFORD v. TOBIN, *November 4, 1749.*

(Reg. Lib. 1749. A. fol. 53.)

Construction of will. Interest of legacy from death of testator, on the manifest intent as to maintenance (1).

Where interest is to commence from the death of testator, and not from the end of a year after (2).

Where the court will give less than the legal interest for a legacy charged on personal estate, as where the fund did not produce so much, and the intention to separate the bulk of the estate.

SIR JAMES TOBIN having an estate in *South Sea* and *East-India* stock, leasehold, and some shares in ships, by his will gave £4000 to two trustees, to be paid and applied in such manner as he should, by writing under hand and seal order and direct; making them and two other persons executors.

Afterward by a codicil he directs the trustees to apply the £4000 to the uses of a boy called *Michael*, aged five years, and then living with *John Tobin*; and his maintenance and education to be paid out of the interest of that £4000.

This was an appeal from a decree in 1739.

For the appellant. Interest for this legacy should commence from the death of the testator; and as to the rate in general, where it is out of personal estate, it stands as a debt on the estate; and therefore is a debt which will bear the legal course of interest, as even a voluntary bond will. So a contract for any sum with interest means legal interest, and here the word *interest* is mentioned. In several cases his *Lordship* has determined, that a general legacy, without mention of interest or any time, should bear five *per cent.* and it is the constant rule [309] where out of personal estate; unless an intent shewn to carry less than the legal interest: but not so where out of land, as no real estate, commonly speaking, produces more than four. This is the whole provision for an infant: and by one obliged by nature to provide for him, as his illegitimate son. The testator has given interest, and the court will construe it legal interest; which takes it out of the discretion of the

(1) See *Crickett v. Dolby*, 3 Ves. 10. *Mitchell v. Bowes*, *ibid.* 232. *Sitwell v. Bernard*, 6 Ves. 520. *Gibson v. Bott*, 7 Ves. 89. 94. 97, &c. See also 1 Sch. and Lef. 11. and *Lambert v. Parker*, Coop. Rep. Ch. 143.

(2) Vide 6 Ves. 250, &c. 7 Ves. 97. 1 Sch. and Lef. 16, 11, 12, &c.

court, as much as if the testator had given legal interest. No laches can be imputed, as he was an infant at the time of the decree.

For the residuary legatee. There is no direction in the will to pay the interest from the death of the testator, nor any thing to take it out of the common case of a legacy's not being payable till one year after; the presumption in favour of a legitimate child not holding in the case of one who is a mere stranger having a legacy. The time of making the will in 1732 is material: for from thence to the time of the decree no more than four could be got: till the exigency of the government upon the war with *Spain* raised the value of money; and then the court where out of personal estate gave five; because the value of money was five in government securities. There are also particular circumstances to distinguish this legacy, and to give but four *per cent.* although five should be given for the other legacies in the will. The trustees actually have the money in their own hands; if then they do not place it out, as they ought, the court will make them pay that interest, which could have been got, if placed out; beyond which they cannot be charged. The court does not supply in favour of natural children by the same rules as for legitimate children; such as the defect of surrender, and the mother's covenant to stand seised to the use of her natural child is void; there being no blood. It cannot be reduced to a certain rule here, what interest shall be given for a legacy, no more than at law what damages a jury shall give: wherever the thing exceeds the demand for it, the price is lowered. So in money as well as other commodities. Exigencies will vary the rate of interest; and there are several cases where four has been given, though out of a personal fund. The best rule to go by is, what interest could in general be got at that time; and there was no fund then, upon which five could be got. Land or government securities were the only two things, upon which the trustees could fairly lay it out: unless perhaps by small sums to tradesmen; upon which if any failure, the court would make them suffer. The infant only acquiesced under an order without complaining that he had a lower rate of interest than he ought.

[310]

LORD CHANCELLOR.

As to the first question, I am of opinion, that in this particular case there ought to be interest from the death (*b*) of the testator, and not only from the end of one year after. *The rule is true, that the interest of a general legacy, for which no time is appointed, is from the end of one year, which is strengthened by the statute of distribution giving one year in the case of intestacy to distribute; the same reason holding where there is a will and executors: yet that rule was not founded upon that statute; being a rule of this court before; who took it from the *ecclesiastical* court, which gave the executor a year to get in the estate, and pay the legacy, before he should be compelled to give an account, &c. And as this court has a concurrent jurisdiction in the case of legacies, it has followed that rule, that there might be no variance in the rule of justice,

(*b*) Legacy payable within a year, legatee had no notice of the legacy, till the executor published it in the Gazette, no interest shall be paid. Pre. Chan. 11.

* This is the rule if the legacy is out of the personalty, unless the time of payment is mentioned, but if out of the realty it carries interest from testator's death, as the land yields profits. 2 P. Wms. 26. 2 Atk. 108. Interest from a year after testator's death, if specific from the death. 2 Vol. 563.

and allowed that time of a year, where no certain time was mentioned. Yet there are exceptions thereto; one of which is the case of a legacy by a father or mother to a legitimate child, whether by way of portion or not. If it is given generally, the court will give interest from the death to create a provision for its maintenance; and, if payable at a certain age, and the child not otherwise provided for, the court will give interest in the mean time before that age. But the court has not extended this to a natural child for two reasons: first from the rule of law considering a natural child as no relation; having indeed no civil blood. Secondly, that it is not fit for a court of justice to give the same countenance to such children as in the case of legitimate children: and, to discountenance practices of that kind, the court has taken them to be out of all such provisions, as the supplying defect of surrender for them, &c. But the ground of the present case is from the words of the will and codicil: although nothing particular can be inferred from the penning of that clause in the will, unless as it takes in the act he did afterward: otherwise there is no pretence that it should carry interest before the end of the year. But in construction of the legacy, the court must take in the codicil, which must make part of, and have the same effect as if it had been in the will; and then it amounts to a legacy in trust: the trust explains the intent, governs and directs every thing relative, and consequently the time of payment. As where the trust imports a fee, it shall be so construed; although the words of the devise would not carry it. Then consider what direction this codicil leaves as to the time of payment. No particular time for the commencement of the maintenance and education; which must be meant continuing throughout; and during the whole time, the £4000 must carry some interest. The court has said, that interest shall follow the principal, as the shadow the body, and that in the case of collateral relations; as in *Vernon v. Archerly*, it carried interest before the [311] time of payment came; although the testator directed payment at the time of marriage; and great stress was laid on a case in Lord *Nottingham's* time, where there was an indication of separating it from the bulk of the estate: but there is something decisive here; that unless the court makes this construction, this child, if he died within the year, would have no maintenance: then no one could expend any thing thereout for him, and whoever had maintained him would have lost his money.

As to the next question; in general the court exercises as large a discretion as to the rate of interest upon legacies, where interest is not particularly given, as in any case; and difficult to reduce it to a certain rule. I do not know, that, where the testator has said interest, the court has held itself so bound, as insisted upon for the appellant, to give the legal interest: but supposing for argument sake it is so: the testator has taken for granted, the £4000 will carry interest. It is to be considered as taken out of the bulk of the estate, to be placed out by the trustees, in whose hands the codicil has considered it distinct from the other two executors. There cannot be a stronger implication, than that his intent was such, and their duty was to have placed it at interest as soon as possible, and thereout his maintenance was to come; which was his view; and no direction of that kind mentioned so as to confine the court to legal interest. Then what discretion is to be used? The general rule has been between interest of legacies charged on land, and on personal estate; and where

nothing more, the court has said, that land never produces profit equal to the interest of money, and will follow the course of things and give interest, where charged on land, one *per cent.* lower than the legal interest. So it is when the legal interest was at six: but in general, where a legacy is out of personal estate, the court gives five (1), and unless that is taken to be a sort of rule, there will be no distinction between them. I agree, that notwithstanding this, after the great fall of the value of money and rate of interest, in many cases, where the court was to give interest by discretion, four only were given, when upon personal estate as I believe, Sir *Joseph Jekyl* did; yet the court laid hold on some particular reason (although perhaps not in every case,) generally on some inquiry upon what kind of fund or security the testator's estate is placed out: and in some cases sent it to the *master* to inquire, and, where they found it did not produce more than four, directed but four; there being then no certain rule, I will not vary this decree as to the rate of interest. It is true the appellant was an infant at the time of the decree, and not precluded by the order made; yet his making no complaint is a kind of waiver. It now comes before me on the general report of the *master*; and it appears, on what kind of funds the estate stood out; which, I believe, computing round, did not make quite four; the dividends on the shares of ships being merely contingent. But there is another reason for not varying

[312] the decree, from the intention of separating this from the bulk; which if the trustees had then done, and placed out, it could not have produced more than four, which is a good rule to go by.

But as to the time of commencement, the decree should be varied.

(1) Not so now. The court allows but £4 per cent. Vide 6 Ves. 520, &c.

LACAM v. MERTINS, Nov. 8, 1749.

(Reg. Lib. 1749. B. fol. 93.)

See S. C. 3 Atk. 1, at the original hearing.—S. C. 1 Wils. 34.—Marshalling assets, by letting simple-contract creditor come in place of a specialty creditor, can only be where the specialty creditor had a remedy against the real and personal assets of the debtor deceased whose assets are in question.

Recital of a debt in a deed under hand and seal, no specialty debt.

(c) MRS. HAY in the life of her husband levied a fine of her estate, making it subject to a debt of £2000 which had been contracted by her husband. After his death she borrows a further sum of £400 and by an indorsement agrees, her estate so pledged should stand pledged with this £400 and not to be redeemed without payment of all these sums.

The question now was, after the *master's* report, how far simple-contract creditors were intitled to come upon her real estate, in the place of specialty creditors.

LORD CHANCELLOR.

(d) The rule of the court, as to marshalling assets, and directing sim-

(c) Ante, 52, 251.

(d) The general rule, is that where one claimant has more than one fund to resort to, and another has only one, the first shall resort to that fund on which the second has no lien. 2 Atk. 346.

ple-contract creditors to stand in the place of specialty creditors *pro tanto* to receive satisfaction, is a very just and beneficial rule, and ought to be adhered to: and the court leans and endeavours to bring creditors within that rule, and extends it, that all the creditors may receive satisfaction. Yet it must be as between the real and personal assets of a person deceased: for the court has no right to marshal the assets of a person alive; it not being subject to such a jurisdiction of equity till the death. Nor can the court extend this relief to creditors further than the nature of the contract will support it; therefore it must be a specialty creditor of the person, whose assets are in question (e); such as might have remedy against both real and personal, or either, of the debtor deceased; it not being every specialty creditor, in whose place the simple-contract creditors can come to affect the real assets, viz. where the specialty creditor himself cannot affect the assets, as where the heirs are not bound; and such it is here; heirs not being bound in the covenant.

Now to apply these general rules to the debts in question; for such debts, upon which there might be remedy against her in her life, or against her representative after her death, the simple-contract creditors are intitled to receive satisfaction *pro tanto*; and therefore for the £400 as being a specialty debt upon her own bond after the [313] husband's death, satisfied out of her personal assets; but not as to the £2000, which there is no ground to make her personal debt, or any debt of her's. It was originally her husband's (f): nor could she then make herself liable by contract. There is no covenant for her payment of the money: nor is there such a covenant, upon which any remedy could be against her personal estate, unless she had been guilty of a breach; all the covenant being, that the estate should stand charged. This covenantee therefore could not have brought an action or other remedy against her or her representative, because no breach. Then there is no body, in whose place to come *pro tanto*; and this is a case for which the court never would strain, however liberal they are in such cases in the construction for creditors; for it is material in this case, that it is the husband's debt; and the intent was not to change the nature of it, and to make it her debt, for it is only recited in the deed; and the recital of a debt under hand and seal, has been held to be no specialty debt, although recited in a deed; for it must stand on its own force; and so I have known it determined by Sir Joseph Jekyl.

(e) 2 Brown, 107. 1 P. Wms. 347. 2 P. Wms. 264.

(f) But she might charge her own estate, 2 Atk. 384. 1 P. Wms. 264.

BEARD v. TRAVERS, Nov. 9 [13th], 1749.

(Reg. Lib. 1749. A. fol. 26.)

Attempt to marry a ward of court clandestinely.

On petition relating to the appointing a guardian to Miss Herbert.

LORD CHANCELLOR.

Any one, as *Amicus Curie* may make application for and in the behalf of an infant, though no relation; as is often done.

In cases relating to clandestine marriage hearsay evidence and declarations are no defective proof; but has weight with the court; especially when uncontradicted by any thing on the other side.

In the present case such order shall be made, as was made in *Barry v. Smith*, and in Lord *Raymond's* case by Lord *Talbot*; that this lady be not married without leave of the court: and that neither Lord *M——*, or his son, have any access to her by letter or otherwise.

[314] JOHNSON v. SMITH, Nov. 10, 1749.

(Reg. Lib. 1749. A. fol. 126.)

Election—Deedpoll not delivered (1), but operating at the death of grantor, and a bond given in favour of a natural daughter. She was put to her election. Gift over, on *A.'s* refusal to marry *B.* The forfeiture held not to take place from an offer being declined once or twice, but from a more formal acknowledgment.

(g) JOSEPH JOHNSON having only a natural daughter, who lived with him, and whom he maintained and educated, expressing great love and affection for her; in 1736, having then a real estate (the annual value of which did not appear) and also a personal estate, consisting in securities chiefly, to the value of £7000, in consideration of love, good will, and affection, executed an assignment, or (as it was commonly called) deed of gift to her, then of the age of nineteen, of all his mortgages, bonds, bills, and other sums he had at interest, to hold to her, her heirs, executors, and so forth, from thenceforth to her and their proper use for ever; "*as I have absolutely and of my own accord, set and put in further testimony.*"

He afterward treated these securities as continuing his own; changing several, calling in, and placing out on new securities, without her consent.

In 1742, about six months before he died, he executed a bond to her, with condition that if he, his heirs, executors, administrators or assigns should pay to her, her heirs, &c. £10,000 within three months next after his death, then the obligation to be void. This was executed and delivered to her.

He afterward made his will: devising his real estate to her and her heirs, so as she intermarried with *William Johnson*; but if she refused to marry him, he gave this real estate to *William Johnson*, and his heirs, making her executrix, and gave her all his personal estate, under the description of all goods, chattels, debts and personal estate.

She refusing to marry *William Johnson*, forfeited the real estate to him; and he dying devised the estate to his father; who brought this bill against her, having married *Sir Edward Smith*, to have the personal estate of *Joseph Johnson* applied in exoneration of his real, and particularly toward satisfaction of the £10,000 claimed by her on the bond.

Which brought a question before the court, whether the defendant was intitled to the benefit of the assignment by the deed poll, and also to the bond? It being argued for the plaintiff, that both should not subsist;

(g) 1 Brown, 445.

(1) See *Pack v. Parrott*, ante, 236, 237.

for the court leans against double portions, even in the case of legitimate children.

For defendant. The question is, whether the plaintiff is in- [315] titled to set aside this deed in a court of equity? consider it in two views. First, whether this is a good assignment independent of the bond? although as to creditors it is merely voluntary: yet the devisee or grantee of the real estate cannot impeach, or come into equity to prevent a recovery upon it. Though the father had access to these securities afterward, she had the custody of them; and the keeping the key is evidence of the possession, actual proof of the delivery to her is not to be expected; and if she had possession before, that excuses delivery. Something passed by this assignment; for though by grant of bonds and securities the debts do not pass, the paper, wax, &c. does. 1 *Inst.* 32. B. Next to consider, whether the bond is a satisfaction of what was given before? It is his own deliberate act; and had he so intended at the time of the execution of the bond, he would have said so, or cancelled the assignment. The doctrine of satisfaction has been declared to have gone further, than if it was *res integra*, in the construing a gift to be a satisfaction of a precedent debt. But a subsequent debt was never held a satisfaction of a prior gift, nor can one gift be a satisfaction of another; nor a legacy a satisfaction of a prior gift; although a gift in the life of the party has been held a satisfaction of a legacy. This is a question between one gift and another; and there is no instance of curbing the testator's bounty. The principle of the court in cases of satisfaction depends on two rules; that it must appear to be the intent of the donor, and that it should be something of the same kind. In the cases of double portions, there is a competition between persons in the same relation, as between children; and therefore a double portion might injure the rest. But the plaintiff's title is by forfeiture, and arises from a condition in restraint of marriage, which the court will never favour; and the deeds themselves import distinct bounties. Cases applicable are 2 *Vern.* 258. 1 *C. R.* 199. and *Oliver v. Brickland* (1), at the *Rolls*, December 1732, and *Sudal v. Jekyl* (2), on the will of Sir *Joseph Jekyl*, where a gift in the life-time and a provision at the death were both decreed to the party.

LORD CHANCELLOR.

The general question is not, what is contended on the part of the defendant, whether the plaintiff is intitled in a court of equity to set aside this deed of assignment; for that is a different consideration; but whether the defendant is intitled to both or confined to one; although she may have an election? The intent of *Joseph Johnson*, who made both these provisions, is very material, and ought to turn the scale of any doubt; both parties being equally volunteers. Two questions arise in this case. First what was the intent or effect of the assignment, as it stood originally, and to the time of the execution of the bond? Next, whether any alteration has been made thereby, and whether the bond is to [316] be considered as accumulated to the deed poll, or to be substituted in its place?

As to the first, I am of opinion, that notwithstanding the strong words of it, it was not his intention to give his whole personal estate to the de-

(1) 3 *Atk.* 420.

(2) 2 *Atk.* 516.

defendant in his life, but a kind of gift *mortis causa*, and to take place only at the time of his death. I think that all the circumstances of this cause are not before the court; not indeed by the default of the parties in a transaction of this kind between a father and his natural daughter. But it appears from the words of the deed itself, following the strong expressions which gave her an immediate property. They are very dark words, yet mean something. One would suspect he had made a will at that time; for something he had done to create a farther testimony of his intent; but as it does not appear what, or whether he had made any will before the last, it must be laid out of the case. The acts which he did, speak strongly for the construction I make. It does not appear this deed was ever delivered to the defendant, but was put by the testator among his own writings; and the evidence on the part of the defendant proves not, that the custody of it was given to her to make use of it as she pleased; and several acts of his speak the contrary. From the nature of the deed also, and his circumstances at the time, it is not to be presumed he would assign to a natural daughter, then living with him, not of age, for whom no match had been proposed, or immediate provision wanting, his whole personal estate; and vest the immediate property of it in her out of his own power; which is incredible: his intent appearing to be to keep this deed in his own power, to make a provision for her, which she should have the benefit of after his death (1).

As to the next consideration. I am of opinion, the defendant is not intitled to both; and that the bond was not intended as accumulated, but as making a different provision for her, of which she will have an election. And notwithstanding the strong declarations of his affection for her, and intent to leave her all, it amounts to little; for the testator plainly intended *sub modo* she should have all. Although she is not to be blamed for not complying, as she might have her reasons for it; yet still it contradicts his intention, which was, that the estate should go in his name: and very probably at the time of giving this bond, he had the making the will in view: but in all events he would make her a fortune of £10,000 which is very ample. The court would not make the construction con-

[317] tended for by the defendant in case of a legitimate child; for which there are very strong cases; as *Thomas v. Keymis*, 2 Vern. and *Upton v. Prince* by Lord Talbot; [Cas. Tal. 71] where it was held, there should be no double portion, although a strong case for it: much less than for a natural child. The cases mentioned do not come up to this. It is said, the rule of double portions holds only among children themselves, and not among collaterals or strangers: but there are no cases relating to double portions where that distinction is made, nor any reason for it, as it is a question of intent: nothing of that kind is relied upon in 2 Vern. 258. In *Thomas v. Keymis* the rule was the same; though the estate might have gone over to collateral relations: the intention therefore was to substitute one in place of the other, which he had always kept in his own power and custody; and which, if in his life the defendant had brought a bill, the court would not have decreed to her. He meant in all events to secure £10,000 and so

(A) 1 Wms. 147. Post, 520.

(1) Vide *Peck v. Parrot*, ante, 236. 237.

far as the personal estate is deficient thereto, the real should make it up: but the defendant is not intitled to both, but to have her election.

HENKLE v. ROYAL EXCHANGE ASSURANCE COMPANY,

November 14, 1749.

Policy of insurance.

Bill to rectify it according to the intent dismissed, there not being evidence to vary the contract (i).

The plaintiff insured a ship at and from *London* to *Ostend*, from thence to *Rotterdam*, from thence to the *Canaries*, warranted an *Ostend* ship: which ship was afterward taken.

The bill was brought to have the policy rectified; for that the intention of the parties was mistaken therein; which was that the warranty should not have been so general, viz. should take place from *Ostend* only, not from *London*: and though courts of law will in the cases of policies by the usage of merchants admit parol evidence, yet not so as to rectify a mistake on parol evidence, as this court will: as by his *Lordship* in the case of *King-street St. Margaret's*, and in *Motteux v. London Assurance Company*, *December 1739*, where the question was, whether the ship was to be insured in port, or in the voyage to *London*, having been lost in port? The evidence here was the deposition of *Knox*, who transacted on the part of the company, that the plaintiff applied to him to insure the ship; and that he believed that the plaintiff told him, she was or had been an *English* ship, and might say something concerning the manner or intent of making her an *Ostend* ship: but that his answer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Ostend* ship, he would insure: and that on these terms and no other the agreement was made. There was the evidence of another person, who varied from *Knox*: but it was said, the circumstances spoke stronger than any evidence that the intent was, that she should be an *Ostend* ship at the time of leaving *Ostend*, she being then in *London*, and could not be an *Ostend* ship, without going to *Ostend*; for which proof [318] was read, that it was necessary she should be registered. Such was the imagination of the parties; and it is absurd to suppose, the plaintiff would warrant her to be so, when he knew she was not: although in general, insurances are proper to be tried at law, yet not always so: this court sending to law under particular directions. The plaintiff's equity is, that this policy, which at law must stand on its own foundation, is not agreeable to the intent of the parties; and a mistake is a profest head of equity; which cannot be proved but by the persons contracting; nor can the plaintiff make use of his material evidence at law. That this court will interpose in such cases, appears from *Callaway v. Ward*, 1728, which was a bill against the insurers of the *Sun-fire Office*; where the plaintiff

(i) 2 Atk. 31. Post, 456. 2 Vol. 376.

(1) See *Doran v. Ross*, 1 Ves. jun. 57. and 3 Bro. 27. *Bartow v. Kilvington*, 5 Ves. 593. *Marquess Townshend v. Stangroom*, 6 Ves. 328.

had the lease of a house insured; and before its expiration entered into an agreement for a new lease; but before execution, though after expiration of the lease, the house was burned; upon application for payment, as within the policy, on the foot of this parol agreement, the office denied it; for that at the time of burning it was not the plaintiff's house: *Lord King* determined for the plaintiff, upon the ground of considering that as done which ought to be done: yet that was as little favourable for the interposition of the court as could be, and the *House of Lords* was of the same opinion. As to the objection, that this is an illegal trade, and therefore the plaintiff, party to an illicit contract, is not intitled to recover: that argument cannot lie in the mouth of the defendants, who were acquainted with it, and ought to pay the loss. This though a trading to an enemy's port in time of war, is not an illicit correspondence: and the case of *D'Oliphant v. South Sea Company* (1), and the case of *Sir Robert Nightengale*, answering that objection. And though the law prohibits the importation of the enemy's goods, it prohibits not the carrying the growth of this country, unless provisions to enemies.

LORD CHANCELLOR.

No doubt, but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified. But the plaintiff comes to do this in the harshest case that can happen; of a policy, after the event and loss happened, to vary the contract so as to turn the loss on the insurer, who otherwise, it is admitted, cannot be charged; however, if the case is so strong as to require it, the court ought to do it.

The first question is, whether it sufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement? Secondly, supposing it so, whether this is such a case, under the circumstances of it and nature of the trade, as that the court ought to interpose and relieve.

As to the first, it is certain, that to come at that there ought to be the strongest proof possible; for the agreement is twice reduced into writing in the same words, and must have the same construction: and yet the plaintiff seeks, contrary to both these, to vary them; and that, in a case where the witnesses on the part of the witnesses vary from each other. The single deposition, upon which it depends is very uncertain; and imports, that they relied on the plaintiff's warranty; leaving the manner of making her an *Ostend* ship, to himself. Then as to the circumstances, during the whole voyage she certainly was to be an *Ostend* ship; and if the intent of the parties was, as the plaintiff says, there should be some proof of that. The witnesses do not say it was necessary the ship should go to *Ostend*, but that she should be registered; if she was not an *Ostend* ship at the sailing from *London*, she might be taken by an *English* privateer, because the end of her voyage was an enemy's port; and the custom-house books not conclusive to the captors; who might shew that the voyage was to the *Canaries*, notwithstanding a different entry there. The

plaintiff's mistaking the law of *Ostend* will not be a ground to vary the agreement; for if the other side knew of it, it is nothing to them, nor turns the loss on them; and there is no colour, that they knew of it, or even that the plaintiffs thought it was so. But in what case on this uncertain proof am I to turn the loss on the defendant? in a case wherein they would have no consideration, as the *premium* might be recovered against them; for it is laid down, that if the ship was never brought within the terms of the insurance, so that the insurer never runs any risk, the *premium* must be entered in an action by the assuree; in which case the assured never would have brought a bill to rectify, but would have taken it on the foot of the policy.

Another point has been argued, which I will speak to, although I shall not go on it in my determination. It is certainly a general rule, that the plaintiff must come into equity with clean hands; and several cases at common law and in equity have gone upon this, that if the contract relates to an illicit subject, the court will not so encourage the action as to give a remedy. Therefore on an action to recover back money taken by way of bribe to a custom-house officer, or on a corrupt agreement, the court says, it will not lie, as the plaintiff was a party thereto; nor is it any answer, that the defendant knew of this illegality; for that answer would serve in all those cases: and therefore the court [320] will stand indifferent. But one exception occurs in these cases, and in which equity differs from the common law; for generally the rule is the same, only equity adheres a little stricter to it: and that is the case of *usury*, in which equity suffers the party to the illicit contract to have relief. But that depends on a distinct reason: that whoever brings a bill in the case of *usury*, must submit to pay principal and interest due, on which the courts lay hold and will relieve; with this farther reason, that is, court considers usurious contracts in somewhat a different light from what the law does: which considers them upon the foot of the statutes: but this court as a fraud and advantage taken on necessitous persons. Now to apply this. I am not satisfied with the answer given to the objection of its being illicit, arising from the case of the *South Sea Company*, for that was not trading contrary to the law of this country, but contrary to the agreement with the company; which is different from a contract contrary to the general law of this country, whether statute, common, or maritime law (1). So of Sir *Robert Nightingale's* case, which was but a plea in the *Exchequer*, and but the private right of the company; being contrary only to their statutes, not to the general law of the land; for in such cases no remedy could be in law or equity. No determination has been, that insurance on enemies ships during the war is unlawful (2): it might be going too far to say, all trading with enemies is unlawful; for that general doctrine would go a great way, even where only *English* goods exported, and none of the enemies imported, which may be very beneficial. I do not go on a foundation of that kind; and there have been several insurances of this sort during the war, which a determination upon that point might hurt. To say no remedy could be in law or equity, it must be very clearly so, and not by any strain. As to the case of insurance on wool

(1) See *Gist v. Mason*, 1 T. R. 84. and *Park on Insurance*, 237, &c.

(2) Whatever doubts existed formerly, it is now settled to be unlawful. See 6 T. R. 23, 35. *Park on Insurance*, 13, 239, 240, &c.

transported to *France*, I never doubted but that was an unlawful contract; and therefore if a case came before me, when I was Chief Justice, both sides knowing it, and a seizure for that by the custom-house officer, I should have held it an illicit insurance and contract.

But upon the first point there is no evidence to vary the contract, from the written words; therefore the bill must be dismissed; but without costs, for it appears to be a loss by a capture not within the intent of the parties.

[321] DOUR v. MOTTEUX, Nov. 21, 1749.

(Reg. Lib. 1749. A. fol. 253.)

Mortmain—Conversion of realty into personalty. Residuary bequest. Real estate directed to be sold, and together with personal, applied (*inter alia*) to charitable purposes, and “that the trustees should place out all the residue of testator’s estate, and the interest thereon, on securities, and divide it, &c.” Held, first, that the bequest as to the charity, was void; and next, that the whole, as to other matters, was turned into personalty. Residuary bequest of personalty includes every thing; as a void legacy, or one that has lapsed.

Residuary bequest of personal estate includes every thing as a void legacy, or one lapsing by the dying in testator’s life.

TIMOTHY MOTTEUX in 1745 made his will, giving all his real estate to trustees, to sell and dispose of the whole, with his personal estate, for payment of his debts, legacies, and performance of his will; he gave several legacies, and among the rest £1200 or thereabout, whereof part was to be laid out in the purchase of freehold lands for some charitable uses, part of which were confessedly within the late *mortmain* act. The remainder of the said lands were to be a fund for a perpetual annuity of £10 *per ann.* to a minister, to preach a sermon once a year to his memory, to keep his tomb-stone in repair, and the inscription thereon and upon the stone against the wall, reciting the gift, legible, of which the minister was then to make oath; and £2 *per ann.* to the clerk, and £2 more to the sexton for ever; and £4 *per ann.* to the mayor and corporation of *St. Albans* for managing and keeping account thereof: and that the trustees should place out all the residue of his estate and interest thereon upon securities and divide among several persons.

It was insisted, that though the devise of the rents of the land to be purchased with the £1200 was so far void by the statute, as they were to be applied to charitable uses, yet that made not the application of the remainder thereof void, which did not come within that description; such as the uses intended to honour his memory, and as a benefaction to the corporation; which, being private and personal gifts, come not within the reason of charitable uses though given to poor persons. If it was copyhold, the court would not interpose to supply a want of surrender; nor would it be an appointment within the statute of *Elizabeth*; land may be devised now to a corporation (as to the *City of London*) in the same manner as before the statute; for the giving lands to a corporation for their own benefit barely as an aggregate body is not a charitable use, unless the particular purpose, for which it is given, makes it so.

LORD CHANCELLOR.

If I should not call this a charitable use, it would be a strange construction of this act of parliament, and would establish all the vanity of such dispositions. [Vide *Attorney-General v. Day*, ante, 218.] The mischief which the legislature had in view, as appears from the recital, which is agreeable to the title, was to restrain the disposition of lands, whereby they became unalienable. The chief occasion introducing that mischief, was, gifts to charitable uses by men in their last moments, when they were under the greatest temptation to give them so: upon which circumstance the legislature laid hold to prohibit such dispositions. As to this, it might be a question, whether not void for uncertainty, from the words or *thereabout*. But it is admitted to be contrary to this act, provided it comes within the description of charitable uses, and part of the disposition is objected not to be so. The charitable uses are the best part of the disposition; and it would be very unfortunate, if that part, which is really good, were it not for the above-mentioned inconvenience, [322] should be set aside as void; and at the same time it should happen, that the worst, such as tends only to perpetuate the vanity of the testator, should be established. This perpetual annuity to the minister is a charitable use; which is not prevented by the addition of the annual sermon. So are the other two annuities; and the rest is not only a vain concomitant of the charitable bequest, but a circumstance attending the general execution thereof; and if this construction were not made, it might elude the act of parliament: for the reward for doing these offices might be as great as the testator pleased. So the gift to the corporation is a reward for their service, and but a circumstance attending the charitable bequest: and though the keeping the accounts is not void, yet if the charity, on which it was to attend, is void, it must be so too.

The whole of this £1200 therefore being a void devise, the question was, whether it should go to the heir at law, for which was cited 3 *P. Wms.* 20, or to the residuary legatee?

LORD CHANCELLOR.

It is not necessary to enter into the question of a devise of land, being void originally or becoming so by dying in the life of the testator, where in the same will there has been a devise of the residue; in which case there has been a difference of opinion, whether it should go to the heir at law or residuary devisee? I believe (*k*), the last determination has been for the heir at law. But that is different, and has been on the consideration of a case, that a man having land could not devise a right accruing afterward to him relating to the real estate; but that is not the case of personal estate, which may be disposed of, though accruing afterward to him, or those in representation of him, being ambulatory. And in this case I am of opinion, the money that should arise by sale of this real estate is turned into personal by the testator, and so intended; it plainly appearing that by the description of *all* his personal estate he meant to include the whole in the residue: so that it is to be considered now as personal. For several cases in which this court has determined land, directed to be convert-

(*k*) 3 *P. Wms.* 19. 4th edit. and 22, note 1, where a distinction is made, where testator intends the real estate to be applied as personal to *all* intents, or only to the *particular* purposes of the will. Talb. 79, ante, 108.

ed into money, are to be so considered, & *e contra*. Then it comes to this; a will is made, in which several legacies, and the residue of the personal estate are given away; one of the personal legacies void by law: the court cannot say for that reason, contrary to the express will, that he intended to die intestate: for giving the residue over includes every thing, let it fall in by reason of that legacy's being void, or lapsing by dying in the life of the testator (1).

(1) Vide 8 Ves. 25. and 2 Rep. on Legacies, 487, 490. &c.

[323] MASCAL v. MASCAL, Nov. 22, 1749.

Baron Clarke in the absence of Lord Chancellor.

A. agrees to settle £100 *per ann.* on intended wife; falling sick devises £100 *per ann.* to her; recovering marries her, and the settlement is carried into execution; she can take but £100 and parol evidence admitted to prove the intent.

JOHN MASCAL agreed to settle £100 *per ann.* on his intended wife, but finding himself ill, made his will and left her £100 *per ann.* but recovering, the marriage was soon after had, and the settlement carried into execution.

After his death she distrained for £200 against the devisee of the estate: who brought this bill to oblige her to take but £100 *per ann.*

For plaintiff it was insisted, that this court commonly leans against double satisfaction. The testator intended only £100 rent charge for the defendant; and its being by two different instruments arises only from change of circumstances; and for this parol evidence was offered; the reading which was objected to.

Baron Clarke (1): If this was a question only on a will, no doubt but the declarations of what he intended by will could not be read. But as this is not to construe the will, but a question, whether or no one is a satisfaction for the other? I should at present think that if you allow parol evidence on one side, you must on the other.

For defendant. This being to read declarations of testator's intending the settlement to be a revocation of the will, is allowing parol evidence contrary to the statute of frauds, which says, no will shall be made or revoked but by writing, and it is explaining a deed contrary to what it appears. It may indeed be admitted in some cases: as where a resulting trust, to rebut the constructive declarations of the trust put on the words contrary to the legal sense. But here the defendant claims by a legal right. Notwithstanding the inclination of the court to admit the reading it, there are cases, where the court cannot do it. There was a strong temptation to admit it in *Brown v. Selwyn*, [Tal: 240.] yet it was not allowed: which case is like this, but stronger.

For plaintiff. The question in that case was litigated; and Lord Hardwicke was of a different opinion to the last. It is admitted to prove the identity of the person; or rebut an equity: so where there is a particular gift to an executor by implication making him a trustee for the resi-

(1) In 3 P. Wms. 353, Lord Talbot refused parol evidence to show the intent, as then the witnesses and not the testator would make the will.

duary, parol evidence may be given, that the testator knew that, and yet intended it; and may be given to the contrary. In all cases of subsequent satisfaction it is allowed on both sides to shew the intent of the testator. This is a mere collateral matter, and, if not admitted would make the statute a gross cover to fraud. Besides the defendant has examined the same witness to the same purpose. [324]

Baron *Clarke* : It is proper to be read. It is said, here are convincing circumstances, that the settlement is a satisfaction of the will : which was only to secure an annuity if he died before marriage. Both are left subsisting ; and the question is, whether here are not two provisions made for the same thing* ? It is impossible to come at the facts, by which the court is to judge, but by being made out by evidence ; nor can the party's intent be proved. The objection made, would go a great deal too far ; but the defendant examining the same witness is unanswerable. In *Brown v. Selwyn*, Lord *Talbot* first allowed the reading it ; but afterward changed his opinion. And the reason he and the *House of Lords* went upon was, that it was an examination to contradict the words of the will : but this does not contradict that.

Then for the defendant was cited *Robins v. Cope* on the will of Mr. *Spinks*, who thereby gave legacies to the two plaintiffs ; and afterward executed bonds to the same persons, although under no obligation to give them any thing ; it being insisted on as a satisfaction, Lord *Chancellor* said, there were no instances that a subsequent debt could be a satisfaction for a precedent bounty, the cases of satisfaction being *vice versa*. The time of making the declaration is very material in cases of satisfaction : and no regard to be paid to declarations not at the time of making the will.

Baron *Clarke* was of opinion, that the defendant must make an election, which £100 she will choose. (m) Not that one is a satisfaction for the other ; but it was a completion of the act ; and the settlement was a corroboration of the will.

* Evidence cannot be read to prove what testator meant by words used in his will, but may as to facts upon which testator made his will, per Lord *Thurlow*, 1 *Brown*. 296.

(m) *Eq. Ab.* 2 *Vern.* 498, 555, 709, 724. 1 *P. Wms.* 324. 3 *P. Wms.* 335. 3 *Atk.* 419. *Prec. Chan.* 240. 5 *Brown's Parl. Cas.* 567. 7 *Vol. 12.* *Contra* 2 *Vern.* 505. 2 *P. Wms.* 614. 3 *P. Wms.* 356. 2 *Vol. 409.* *Brown.* 129, where Lord *Thurlow* after giving the reason for these different determinations agrees with the latter, and relies on a rule laid down by Lord *Hardwicke*, 3 *Atk.* 96, that where there is difference in any circumstance between a legacy and a debt, the legacy should not be deemed a satisfaction. In the new edition of *Prec. Chan.* 240, Mr. *Finch* has reported the case of *Devese and Pontel*, determined at the Rolls, Mich. Term, 1785, where the Master of the Rolls, in concurrence with the authority of Lord *Thurlow*, determined agreeable to the doctrine of these latter cases, that a devise is not a satisfaction for what the wife is intitled to under marriage articles.

KNIGHT v. DUPLESSIS, November 23, 1749.

The court will not appoint a receiver on bill by heir against a devisee to controvert the will, unless there are strong circumstances.

This court is not to appoint a receiver on account of a dispute in the ecclesiastical court concerning the probate.

LORD COLERAIN devised his estate to the defendant Mrs. *Duplessis* (by

whom he had a natural daughter); till her daughter arrived at twenty-one or married; making her executrix with another person, who both proposed to act and prove the will, having propounded it to the *ecclesiastical* court.

The heirs at law brought a bill to controvert the will, and moved for an injunction to stay the defendants from receiving the personal or the rents and profits of the real estate, and to have a receiver appointed; which, the answer not being come in, was denied.

[325] And now immediately on the answer's coming in, it was moved again, on the ground that there was a dispute in the *Ecclesiastical* court concerning the probate; which not being yet granted, there was none to get in the debts, &c. therefore this court should appoint a receiver; as in *Powis v. Andrews* (1): and as to the real estate, the tenants will not pay the rents to any of the contending parties; so that they are in danger of being lost. And an affidavit was read, that Mrs. *Duplessis*, the sole trustee for the receipt of them during the minority of her daughter, was in low circumstances.

LORD CHANCELLOR.

This is a very early motion for a receiver; and no ground for it: not the least colour as to personal estate; for if the litigation in the *Ecclesiastical* court is likely to be long, the court has jurisdiction to grant administration *pendente lite*, which administrator as it is now settled, may maintain an action to recover the debts, whereby no loss can be to the personal estate: therefore not like *Powis v. Andrews*, or the case before Lord *Harcourt*, upon which that of *Powis* was founded. For there was a will on extraordinary circumstances, and a probate got, after which they could not appoint an administrator *pendente lite*; so that there was no other method for the next of kin against a will obtained by fraud. As the circumstances now stand, they are stronger in favour of the will, which is all in the testator's hand, than against it. On the first production the heir at law appeared well satisfied therewith; and no imputation upon one of the acting executors: nor is there any such rule, that on a dispute in the *Ecclesiastical* court concerning a probate, this court should appoint a receiver of the personal estate.

And a great deal of what I have said, goes to the real estate, it not being to be laid down as a rule, that on a bill by heir at law to controvert a will, this court is to appoint a receiver. He may bring an ejectment if the will is not good; and the court will assist him by looking into deeds and writings. There is no ground to come for a receiver, unless other circumstances: and as to the tenant's not paying the rent, that has been a ground sometimes to appoint a receiver; but the evidence for it is very slight; and the testator died but last August. The most material part regards Mrs. *Duplessis*; the nature of the devise to her, is a kind of chattel interest, during which, for aught appears, she has the legal estate in the land. It is a loose affidavit, that she is a person of little or no fortune, without any suggestion of bad behaviour in her, and is not a foundation in the outset of a cause to appoint a receiver. If that was the rule, in eve-

ry case where there is a will, and a trust term to a person not in very opulent circumstances, though not guilty of any misbehaviour, the court should change the trust: besides this would bring an impu- [326] tation upon the will, which the court is not to do.

The plaintiffs therefore must take nothing by their motion.

ANON. (1) *November 23, 1749.*

(Reg. Lib. 1749. B. fol. 40.)

S. C. *Post*, 409. *Quod vide*.—Inrolment of decree vacated being done too quick, though strictly regular.

MOTION to vacate the signing and inrolling the decree. No *caveat* to prevent the inrolment had been entered with the secretary for decrees and injunctions, the proper officer; the party by mistake applying to the *Rolls* chapel to enter a *caveat*; which was not the proper place; and when he afterwards went to the secretary for that purpose, it was not till after it had been tendered to his *Lordship* to be signed.

LORD CHANCELLOR.

Dispatch and expedition is certainly to be commended; but that must be in a reasonable sense, for the signing and inrolling decrees is notwithstanding not encouraged, because the doing it tends to create greater expence on the parties, if there is a small mistake, &c. in the decree occasioning either an appeal to the *Lords* or a bill of review, especially in decrees for account: for often in the course of the account, some particular direction necessary to do justice has been found out which could not appear before, upon which liberty has been granted to rehear; which, if the decree is signed and inrolled, cannot be done: and therefore Sir *Joseph Jekyll* has said they ought not to be too quick. The court seeing the inconvenience of the quick signing of decrees, is the reason of giving liberty to the party to enter a *caveat* without giving any reason for it, which will prevent the inrolling for a month. I never knew greater dispatch than in the present case; therefore, though it is strictly regular, yet being so quick, it is within the reason of the common law courts setting aside judgments every day, as on surprise; although they are strictly regular. So may this court (2), especially when it partly arises on the defendant's mistake.

It must therefore be vacated.

(1) The name of this case is *Wright v. Wright*, and is the same which is reported in its subsequent stage, *post*, 409.

(2) *Vide Ante*, 205. 5 *Ves.* 702. and 16 *Ves.* 114.

BILLON v. HYDE, November 25, 1749.

(Reg. Lib. 1749. A. fol. 227. Entered "*Billon v. Hanbury*.")

Relief in account, as to payments made to a bankrupt after a secret act of bankruptcy (1), when the assignees had recovered by action payments made by the bankrupt.

JOHN FRANCIS MITCHEL, an *Italian* merchant, became bankrupt *April* 18, 1743, having great dealings a considerable time before; but the act of bankruptcy then committed was a secret act, very little known; as it was admitted; he after appearing upon change and other public [327] places, and in all respects without suspicion of being a bankrupt or in insolvent circumstances.

There were large dealings between the plaintiff and him, and an account commenced *November* 1742, and these dealings continued after the act of bankruptcy till the *June* following, and were very various: but they appeared to be fair; principally consisting in remittances and negotiating bills of exchange to *Italy* or other parts of the world, and several sums were paid by the plaintiff to him during the space of time between *April* and *June*: some to him, others to his order, some by way of loan, and particularly by some *items* paid by the plaintiff for *premiums* on insurance upon ships for his benefit; and others for goods at the custom-house. But the sums of money paid by him to the plaintiff amounted to £3018 2s. 2d. bills of exchange drawn by the plaintiff.

After the commission of bankruptcy issued, and assignment was made, the assignees seeing this transaction, and that these sums were paid after the act of bankruptcy was committed, brought an action of *indebitatus assumpsit* in *B. R.* against the plaintiff for these several sums, as for money had and received to the use of the assignees. It was tried on *non assumpsit*; and it appearing these sums were paid after the act of bankruptcy was committed, the assignments by relation overcharged it, and avoided *meane acts*: so that they recovered in that action.

The plaintiff here insisted, that notwithstanding that recovery by the strict rule of law, still an allowance ought to be made him for all that was paid to *Mitchel* on the other side of the account falling within the same period of time, amounting to £712, that this was not done then, and was refused by the commissioners since. The bill therefore was to have this sum deducted out of the £3018 2s. 2d.

The assignees insisted he was not intitled thereto: that that was quite a distinct thing; consisting partly in loans, partly of money advanced for other purposes. The assignees have recovered by their own strength: then why should the plaintiff recover, being distinct persons and in distinct rights? and the bankrupt could not contract any debt to charge his estate, or to charge the assignees after the act of bankruptcy committed; and upon that reason it was over-ruled at the trial.

Lord Chancellor said, that decisions of courts of law in such cases have been so strict, that it may be pretty difficult to come at the relief sought: and yet he feared, if the plaintiff had not some relief it would be attended with great injustice; and if he could find a ground to relieve the [328] plaintiff he would: but for that it must have equitable circumstances. Therefore he would consider of it; and now delivered his opinion.

(1) But see now Sir S. Romilly's act, 46 *Geo.* 3 ch. 135.

Two questions arise: first, whether the plaintiff is intitled and has a right to have this allowance and deduction made? The second, supposing it so, whether he has pursued a proper remedy: or whether this matter is not so concluded by the judgment and verdict at law, that the hands of this court are tied up; and therefore the plaintiff not intitled to relief, if the law will not relieve?

As to the first: I am of opinion the plaintiff has a right to it; but that will depend on the nature of the demand at law, of the defendants and assignees under the commission, and the nature of the remedy they have pursued for it.

As to the nature of the demand at law against the plaintiff for this money paid by *Mitchel* for valuable consideration, without fraud, after the act of bankruptcy committed, it is *stricti juris*, and the hardest case the law of *England* admits, depending on the relation. By the act of bankruptcy all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time: and it overcharges all those acts, without regard to the fairness or fraud in them. So that a sale of goods by the bankrupt after the act committed is a sale of their property: for which they may maintain *trover* (n). So it is as to the payment of money; and this was the intent of the act of parliament; the statute of *J. 1 c. 19. sect. 14*, being, that this shall not extend to the prejudice of any debtor of the bankrupt, who paid his debt after the act committed, without knowing of it. This relation, the assignment has, does not only overcharge acts done in *pais*, and contracts entered into by such persons having committed an act of bankruptcy, * but also acts on record, and legal acts done by him, such as judgments, so that if execution is taken out after the act committed upon a judgment before, that execution is undone and set aside. It is said, that this rule founded on this act of parliament is contrary to the general reason of the law; which says, that fictions of law and legal relations shall not enure to the wrong of any one: which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it, on this general rule: that it is better to suffer a particular mischief than an inconvenience; and the legislature foresaw, there would be a particular mischief which they cured by that *proviso*; but did not extend it farther; because the inconvenience on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments would put it in their power to defeat their just creditors of their debts, so as it would be difficult commonly to find out, whether there was a mixture of fraud, the legislature thought it better to [329] lay down that general rule. But trade becoming more extensive, that act 19 G. 2. was made, and notwithstanding it is said, this case

(n) By statute 21 Jac. 1. cap. 19. sec. 14. purchasers for valuable consideration shall not be prejudiced, unless the commission is sued out within five years after the bankruptcy: and by 19 Geo. 2. cap. 32. sec. 1. payments made by bankrupt in the course of trade without knowing of it, shall not be affected.

* 1 Black. 67. Vide 2 Vern. 229. Where an award was made in an adversary suit, and confirmed by the court, one of the parties being a bankrupt, but not known then to be so, and a commission afterward taken out. The award bound the assignee under the commission, there being no fraud or collusion in obtaining it; but the reporter puts a quere, if the decree on a rehearing was not reversed. [It was reversed in the House of Lords (after an affirmance on a rehearing). See the note in Mr. Raithby's edition.]

is not within that act, which it certainly is not in point of time, yet it is directly within the recital thereof. One principal case provided for by that act is the negotiating bills of exchange; which was a case very necessary to be provided for, because negotiable in various parts of the world: therefore though this is not a case within the provision of the act, because of the posterior time of commencement, yet it is within the mischief; and therefore courts of equity ought to go as far as is consistent with the opinion of the legislature of the mischief above mentioned. In what shape this was insisted on at the trial, does not appear; whether offered only in mitigation of damages; and then it was very natural for the court not to admit it: and the court might have thought, that at the meeting of the creditors they would have agreed on this; having power to compound the debts by agreement of the major part of the creditors by the new act of parliament.

But however that was the next question is, whether the plaintiff is intitled to have this allowance in some shape on the foot of the dealings themselves, and next from the nature of the action brought by the assignees? And I am of opinion, he is intitled from the nature of the action and demand against him at law (o). It is quite new to me, that assignees under a commission of bankruptcy should maintain an *Indebitatus assumpsit* (which is an action founded on contract) for money *bona fide* paid by the bankrupt after a secret act of bankruptcy to another person for valuable consideration. How long that is in practice I know not; I thought they were obliged to bring an action of *trespass* or *trover* for the *tort*: otherwise they would be nonsuited; of which opinion were Chief Justice *Parker* and Lord *Raymond*. And for that purpose I have a manuscript case at *Guildhall*, the sittings after T. T. 4 G. 1. It was an *assumpsit* by an administrator for money had and received, &c. and *non assumpsit* pleaded; the case was, the defendant was nurse to the intestate during his sickness; and being alone in the house when she died, conveyed away money and every thing portable. The defendant objected, the action would not lie; there being no colour of contract, but a wrongful taking or conversion, for which *trover* lay. But *Parker*, C. J. held the action maintainable; because though the taking was wrongful, yet the plaintiff might agree afterward and make it right; and the bringing this action was an implied agreement: and that there were only two cases, wherein an action for money had and received, &c. could not be brought, *viz.* for money won at play; and money paid after a bankruptcy; in both cases unless you insist on the *tort*, the *tort* is waved. He went upon this: that you cannot affirm part, and disaffirm part; so that the plaintiff there might bring *trover* or *trespass* for the *tort*, or an action for money had, &c. which the court laid down clear and without doubt, admitting two cases in which that action could not be brought for wrongful taking. In the case of money won at play, the action must be on the *tort*, not for money had, &c. that admitting the contract at play. So I have ruled at *Guildhall*, and I believe non-suited a plaintiff, when he has gone

(o) This action has been much extended of late as a useful remedy; the same principle which supports it against one, receiving money from the bankrupt himself, will support it against another who receives it under the bankrupt; in both cases it is the property of the assignees, who may elect to bring an action of *tort* or *assumpsit*, but not both. 2 Black. 830. 3 Wils. 304. 3 Lev. 191. Holt, 95. 12 Mod. 324.

contrary. The judges perhaps have gone further since, and admitted such action rather than put the party to *trover*: and this action for money, &c. has been extended to advance the remedy of the party. Yet courts have gone a good way against this very strict construction of the act of parliament; and where *trover* was brought, have taken it out of the act; for which purpose is the case of *Rider v. Fowle*, 3 Lev. 58, which was directly within the words of the statute, and within that legal relation, but the court would not construe it within it; and the action that was brought for the money, was *trover*. But whether *trover* was the proper action is not the point now for consideration; that being proper for the judge who tried the cause. The question now is upon the allowance; the assignees insisting on it by way of contract. Had the strict remedy been taken and *trover* brought, it might be a stronger case against the allowance. There is no foundation to raise an *assumpsit*, which must be founded on contract either in fact or in law: and there was no contract in fact; for a contract must be with somebody. Here the law has determined against the contract by the relation from the intervening of the bankruptcy. It is said, in the notion of this court a trustee must have the legal estate for somebody. But why should he not be considered as factor or agent for the assignees? And that the bankrupt must be considered as a trustee; but hardly so; because if assignees will go in this method, and affirm acts done by the bankrupt, it is right and just to take the bankrupt to be their factor or agent as to all acts fairly done, although not so as to bind them by fraudulent acts. And it must be so taken; for this action upon contract cannot be maintained but by contract on one side or other. It is very hard to say, assignees in this new method of proceeding by *indebitatus assumpsit* should be allowed to affirm acts of bankruptcy in part, and disaffirm in other part; which has been refused by courts of law; for which there was a material case in *B. R. Wilson v. Boulter, Hil. 13 G. 1*, where *trover* for money was brought by an assignee. Not guilty pleaded; it was tried by Lord *Raymond* at *Guildhall*, who, doubting, made a case of it, viz. *Boulter* in May 1724, became bankrupt; in August following a commission issued against him, under which the plaintiff was assignee: in the June between the bankruptcy and commission the bankrupt's wife delivered money to the defendant to buy *South Sea* and *East India* bonds; the defendant then knowing of the bankruptcy, and that the money was part of the bankrupt's effects, bought thirty bonds, and delivered them to the wife: in September the plaintiff the assignee seized twenty-two of these bonds, and took them for the benefit of the creditors, as part of the bankrupt's estate; and brought *trover* for the money laid out in the remaining eight bonds. The question was, whether the defendant was liable in this action for the money? And the whole court was clear, that the assignees seising part of the bond was an affirmation of the defendant's act in laying out the money; and that part could not be affirmed and the other part disaffirmed. And this is in some measure allowing the act of the bankrupt on the foot of the contract, and yet disallowing it on the other side. This is a strong case, why the plaintiff in this cause should have a proper allowance. [331]

But it is said, this allowance should have been made at law; and that it was determined at law, that he should not have it; which is conclusive. But I am of opinion, it is not conclusive; for as the assignees proceed on the foundation of the contract, this is a matter of account; and therefore

though not allowed at law, this court, having jurisdiction of accounts, takes them notwithstanding the verdict: so will the court here allow to the plaintiff so much, as he ought to be allowed.

Which brings it to the question; how much he ought to be allowed; and as so great a sum as £3018 was recovered from him; it is very hard for the assignees to insist, that any part of this £700 should not be allowed. As to the equity of the case, I am very clear in my opinion: but I own, I have difficulty as to the particular sums to be allowed; the plaintiff having examined witnesses, who have sworn to part, and that the most considerable part, as lent: going on and saying so much lent, and so much paid: but this is very nice; and if by inquiry, or other method I can come at it, I will.

Therefore let the cause stand over; and I would recommend it to the assignee to compound in some manner; for it is very hard against the plaintiff.

It was afterwards compounded.

· ROW v. DAWSON, Nov. 27, 1749.

(Reg. Lib. 1749. B. fol. 89.)

A. borrows money of *B.* and gives him a draft upon a fund due to *A.* out of the *Exchequer*, and becomes bankrupt; this is an assignment thereof to *B.* for valuable consideration, which shall prevail against the general assignees under the commission of bankruptcy.

Chose in action is assignable in equity; and no particular form requisite.

Tonson and Cowdery lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz. "Out of the money due to me from Horace Walpole out of the *Exchequer*, and what will be due at Michaelmas pay to Tonson £400, and to Cowdery £200 value received."

Gibson became bankrupt: and the question was, whether the defendants Tonson and the executors of Cowdery were first intitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs the assignees under the commission are intitled to have the whole sum paid to them; it being insisted for them, that this draft was in nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy in law or equity?

[332] LORD CHANCELLOR.

At first I a little doubted about my own jurisdiction; and whether the plaintiffs ought not to have gone into the *Exchequer*, as being a court of revenue; for this is not a personal credit given to, or demand upon the officer: but to be paid out of that money issued out of the *Exchequer* to the officer; and this is on warrant, to be paid out of the revenue of the crown for public services. But there is something in the present case delivering it from that: the officer admits, he has received a sum of money applicable to this demand, which brings it to the old case of a *liberate*, which a person has under the great seal for the payment of money: upon admission that the officer had money in his hands applicable to

the payment, and proof thereof, that would give courts of law a jurisdiction, so that an action of debt might be maintained on the *liberate*.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand: therefore not a draft on personal credit to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in *B. R.* not to be a bill of exchange, was a draft by an officer on the agent of his regiment to be paid out of his growing subsistence. Then what is it, for it must amount to something? It is an agreement for valuable consideration before hand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of *Swinburn* or *Gibson*, it is a credit on this fund, and must amount to an assignment of so much of the debt: and though the law does not admit an assignment of a *chose in action* (p), this court does: and any words will do; no particular words being necessary thereto. In the case of a bond it may be assigned in equity for valuable consideration, and good although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him:" this is just that case; only it is not a debt arising from specialty; therefore like an assignment of rent by direction to a tenant or steward to pay so much of a year's rent to a third person. The case of *Ryal v. Rowles*, *post*, now under the consideration of the court, occurred to me. [333] There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission: and it is clear, that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause in the statute, *J. 1.* But this is clear of that doubt, because this was a debt due to *Gibson* without any specialty. This draft, which amounts to an assignment, is deposited with the officer *Swinburn*, and therefore is attached immediately upon it: so that *Swinburn* could not have paid this money to *Gibson*, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration (1).

(p) And so is a possibility for valuable consideration. *Post*, 391. 2 Vol. 6.

(1) The costs of all parties were directed to be paid out of the remainder of the *Exchequer* monies, after deducting the monies to be paid to T. and the executors of *Cowdery*. R. L.

THOMAS v. KETTERICHE, Dec. 5, 1749.

(Reg. Lib. 1749. B. fol. 113.)

Distribution—Granddaughter of the sister, and the daughter of the aunt of the intestate are in equal degree.

This court to determine by same rules as to distribution, and legacies as the ecclesiastical court.

The rules of computing degrees different in the civil from the canon law; our courts compute by the former.

A CONTEST arose in the *Ecclesiastical* court between the plaintiff and defendant for the administration to *Silvester Andrews*, who died intestate: the plaintiff being grand-daughter of his sister; the defendant daughter of his aunt.

The pedigree stood thus.

Andrew Crook, the common ancestor, had *Mary Andrews* and *Sarah Wastfield*; *Sarah Wastfield* had the defendant; *Mary Andrews* had *Silvester* the intestate and *Rachael Thomas*, who had *Crook Thomas*, who had *Anne* the plaintiff.

The sentence of the judge of the *Prerogative* court was, that the defendant was one of the next of kin to the intestate and in equal degree with the plaintiff; whereupon he granted administration to the defendant, who was at full age.

The present suit in this court concerned the distribution of the estate. For plaintiff was cited *Pool v. Wilshaw*, December 9, 1708, in the *Exchequer*, where *F. Wilshaw* having two sons, *Francis* and *Benjamin*, by his first wife, and one son *Richard* by his second wife, devised his personal estate between *Francis* and *Benjamin*, making his brother *Thomas* executor; *Francis* having received his share died; and *Thomas* took administration during the minority of the other son; thereupon the plaintiff, mother of the testator's first wife and grandmother of *Francis*, preferred her bill for share of the personal estate of *Francis*, with *Benjamin* the brother of the whole, and *Richard* brother of the half-blood; it was ar-

[334] gued by *civilians*, that the plaintiff was intitled to this share, and stood in equal degree with the two brothers; but the court were of a different opinion, and decreed the plaintiff should have no share. On the foundation of which case the *Master of the Rolls* determined the case of *Norbury v. Richards* last term. The plaintiff here is not obliged to go up to the common ancestor; claiming in a direct line from the mother of the intestate, and cannot go higher as the defendant must, in order to bring it down to her; and then the plaintiff is within three degrees, and the defendant four, according to their own computation; but brother and sister are considered but as one degree; so that still the plaintiff must be nearer: there being but three degrees: the intestate and his sister *Rachael* making but one.

LORD CHANCELLOR.

The first question is, whether I am not concluded, by what the *Ecclesiastical* court has done? And I think I am, and cannot determine contrary. That court is bound to grant it to the next of kin; and though the plaintiff is an infant, yet if nearer than the defendant, it must have been

granted to some person during his minority: but both being in equal degree, that court has an election to which to grant it, and has given it to the defendant; then if I should determine them not to be equal, but the plaintiff nearer, it is directly contrary to the foundation of this sentence, which would make it erroneous, and to be reversed. The consequence of which would be, that by choosing to come here for a distribution, you would change the rule relating thereto: for the suit might have been in the Ecclesiastical court for a distribution as well as here; and that court could not have contradicted the sentence, by which administration was granted. Then I am equally bound thereby: being bound to determine by the same rules, like the case of legacy; for the rule of law, by which the decision is to be made, cannot be changed by choosing the court, in which to sue.

But to enter into the merits; if it was open to me to determine contrary, according to the rules, by which this computation is to be made, the plaintiff is not nearer, but in equal degree. There are several rules of computing degrees: which are reduced to the maxims of the different laws, to which they relate. The rule of the civil law is, *quot personæ tot gradus*: computing up from *persona proposita*, the intestate, (whose estate is in question) to the common ancestor, and then down to the person claiming the relation to that intestate; and as many persons as are in this ascending and descending line (except the common ancestor, who is not reckoned as one) so many degrees. The rule of the canon law is different: *viz. quo gradu distat remotior a communi stipite, eodem distant inter se*. Therefore they only compute up to the common ancestor, not down again: and that person who has the smallest number of degrees to the common ancestor, is the nearest relation. The [335] reason of establishing that rule by the canonists was, what is mentioned by Sir Joseph Jekyl in *Mentney v. Petty*, *Prec. Chan.* 593, *viz.* the nearer they bring the relation, the greater their trade of dispensations. But that rule of the canon law has been excluded in our courts (1) who compute by the civil law; as settled in *B. R.* In *Blackborough v. Davis*, 1 *P. Wms.* 41, it was objected, that there is no occasion to go up to the common ancestor, because of the immediate relation between brother and sister making but one degree. But I do not take that to be the rule of the civil law, but the common law in case of descents. But the civil law does not consider the relation between brother and sister as but one degree: which is proved from 1 *J.* 2. 17. as appears from *Blackborough v. Davis*, *Salk.* 251. The reason of which act of parliament was that the mother surviving might carry away all from the brother and sister. The statute declares she shall have but one equal share with them: and directly contradicts that rule, that brother and sister are to be considered but one degree. But supposing that not decisive, and that brother and sister should be but one degree, that has never been allowed but where the question has been with the brother and sister claiming, not where to bring in collateral relations; and that was the case of *Wilshaw* in the *Exchequer*, where the brother of the intestate excluded the grandmother. What is insisted upon is, that wherever brother and sister meet in the course of computation, you shall stop there, and not compute higher, but it has never been so determined in computing among remote relations;

(1) But in descents our law agrees with the canon, and rejects the civil law.

which would in fact bring in the right of representation, beyond what the statute allows, viz. beyond brother's and sister's children, among collaterals.

The decree therefore must be for an equal distribution.

PYOT v. PYOT, December 6, 1749.

(Reg. Lib. 1749. B. fol. 112.)

Devise of real and personal estate in trust for the nearest relations "*of the Pyots.*" The latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the name of *Pyot*, by marriage, held not to exclude (1).

(q) DAME WITHRINGHAM devised her real and personal estate to trustees, their heirs &c. first for her daughter *Mary Wiltringham*, her heirs &c. for ever. *Proviso*, that if that daughter should happen to die before twenty-one, or marriage, then all the rest and residue of her estate both real and personal in trust to convey, assign, and set over the same to her nearest relations of the name of *Pyot* (2); and to his or her heirs, executors, administrators or assigns for ever.

The daughter died under twenty-one and un-married. At the death of the testatrix there were three persons then actually of the name [336] of *Pyot*, viz. a man and his two sisters, then un-married, and another sister originally of that name, but un-married at the time of making the will. At the time of the contingency's happening there was another person, who was heir at law to the testatrix, and of the name of *Pyot*, but more remote in degree than the others.

The heir at law insisted, this devise over was uncertain and void; so that upon the contingency happening it descended to the heir at law 5 Co. 68. b. 1 *Vern.* 362, and *Taylor v. Sayer*, Cr. E. 742, though now denied to be law, shews the reason the judges went on in determining wills uncertain. Relation cannot be properly *nomen collectivum*; for such are words, that have no plural, as *stock*. Heir though *nomen collectivum*, is not so in its first sense; as held in *Archer's case*. *Perriman v. Pierce*, 2 Rol. Rep. and Pal. 303, shews, that the judges, notwithstanding their inclination to construe a word plurally, yet where the testator has used it in the singular number, will not extend it further. But supposing it not void for uncertainty, the heir at law is the person probably meant by nearest relation. The testatrix had in view a single person, and could not intend to give it to all her relations. *Chapman's case*, *Dyer*, 333, shews that a devise to the family or *Stock* goes to the heir; and this will is very accurate except in this place; and if not meant to tie it up to a single person, would have been mentioned so.

Next on the supposition of its not being void, the question was, who were

(q) Devise to trustees to invest in stock, and pay dividends to testator's son for life, and after his decease to his eldest son and his heirs for ever, and in case of their death without issue, to his nearest relation for ever, held a good devise, and the nearest relation at the time of the event happening took. 1 Brown, 293.

(1) See 15 Ves. 92.

(2) Not so—but "*of the Pyots*," which Lord *Hardwicke* relies on, post, 338.

the persons to take under that description? Whether the sisters, who both married before the contingency happened, on which the devise over took effect, should be let in with the plaintiff their brother; the contrary being insisted on for the plaintiff, because this devise must refer to the time of the contingency's happening, when they were not of the name of *Pyot*: and *Jobson's case*, *Cr. E. 576.* and *Bon v. Smith*, *Cr. E. 532.* were relied upon.

LORD CHANCELLOR.

This is a sort of scramble for the estate, and some difficulty arises, from what is insisted on by the answer of the persons claiming under the same general right with the plaintiff; giving colour to the argument of the heir at law from the uncertainty. This limitation differs much from *Jobson's case*: that being a devise in tail, remainder to the next of kin of his name; which was a vested remainder. This is a devise in fee, upon which no remainder could be limited, but determinable on a contingency; which if in a reasonable compass of time, as this, is allowed. A devise is never construed absolutely void for uncertainty, but from necessity. Therefore if one devises an estate to his son, and he has several [337] sons, and has not pointed out which; that is uncertain, and goes to the heir at law unless it could be construed *eldest son* by way of eminence; which would be the same thing; the eldest heir at law. So in other cases; as in 1 *Vern.* 362; which was absolutely uncertain. But yet if there is a possibility to reduce it to a certainty, the devise is good. As a devise to his son *John*, having two of that name; court of law, although they adhere to words of the will as much as possible admit an averment to determine which the testator meant, which shews that every court of justice, law, or equity, leans to make a construction if possible, *ut res magis valeat*. Then the question is, whether there is such uncertainty in this devise over? and if there was a necessity to take this to relate to a single person it would be so; as there are several in equal degree of the name of *Pyot*; but I do not take it so; *Relation* is *nomen collectivum* as much as *heir* or *kindred* [1 *Co.* 66.] A devise to *A.* and the heir-male of his body is an estate-tail; so held lately in *B. R.* It is true, it was held otherwise in *Archer's case*, but that was upon another ground; for if it was only on the point of the singular number, it would have been an estate of inheritance. Suppose it had been to the nearest kindred off the name of the *Pyots*; that is the singular number: and I admit, that word is used as *nomen collectivum* oftener than the other, there being no plural to it, (though I have seen it used in the plural in incorrect writings:) in common parlance, *Relation* in the singular number is used as *nomen collectivum*, in the same sense as *kindred*; and no difficulty arises from the words *his* or *her* in this case, any more than where the word *heir* is used. But this is a trust of both real and personal estate: and suppose this had been a devise of personal only; all those persons who are in equal degree of relation, of the name of *Pyot*, would be intitled to take equally: and the court would have properly taken into consideration, what would be the rule of distribution. Then the court being upon a question of construction who are the persons designed, the involving the personal in the same trust and devise, is a circumstance determining the construction as to the real; affording a proper key to find out who are the persons designed to take under

this description; for the testator must have had but one intention (1). As to *Taylor v. Sayer*, it is directly contrary to law: and I will lay but little weight on the reasoning in that case, to support a resolution which is wrong.

The next question brings into consideration another person, not before the court, viz. the sister married at the time of making the will; which is the great difficulty what decree I shall make *. I am not quite satisfied with the resolution of *Jobson's* case, and think it a very odd one. In such a devise there is no regard had to the continuance of name; but that case differs from the present. The remainder there to the next of kin of the name, was not a contingent limitation over upon a fee de-
 [338] vised precedent: nor was it a contingent, but a vested remainder; and therefore referred to the time of making the will: whereas in this case, the description of the person must refer to the time of the contingency happening, viz. such as at that event should be her nearest relation of the name of *Pyot*. Then taking this to be *nomen collectivum*, as I do, there is no ground in reason or law to say, the plaintiff should be the only person to take: because there is no ground to construe this description to refer to the actual hearing the name of that time, but to refer to the stock "*of the Pyots* (2)." If it refers to the name, suppose a person of nearer relation than any of those now before the court, but originally of another name, changing it to *Pyot* by act of parliament: that would not come within the description of nearest relation of the name of *Pyot*; for that would be contrary to the intention of the testatrix; and yet that description is answered, being the name of *Pyot*; and perhaps nearer in blood than the rest. Then suppose a woman nearer in blood than the rest, and marrying a stranger in blood of the name of *Pyot*; that would not do: and yet at the time of the contingency she would be of the name. In *Jobson's* case, and in *Bon v. Smith*, (which was a case put at the bar by Serjeant *Glenville*, which was often done in those times, but cannot be any authority,) it is *next of kin by name*; which is a mere designation of the name, and is expressly different here. It may be a little nice; but, I think, "*the Pyots*" describe a particular stock, and the name stands for the stock; but yet it does not go to the heir at law, as in the case of *Dyer*; because it must be *nearest relation*, taking it out of the stock; from which case it also differs, as the personal is involved with the real; and it was meant that both should go in the same manner; and shall the personal go to the heir at law? Then this plainly takes in the plaintiff and his two sisters unmarried at the time of making the will, although married before the contingency. And I think the other sister, not before the court is equally intitled to take with them; the change of name by marriage not being material, nor the continuance of the name regarded by the testatrix.

This is like that case in the *House of Lords*, which was a devise on condition of marrying a person of his name (3). The lady married a person who changed his name to that in the will: the *House of Lords* held

* The parties consenting removed the difficulty of her not being made a party.

(1) So *Roach v. Hammand*, Prec. Ch. 401.

(2) These were the words used, and not "*of the name of the Pyots*." See R. L.

(3) *Barlow v. Bateman*, 3 P. W. 65. and 4 Bro. P. C. 194. octavo edit.

this voluntary change was not within the benefit of the bequest, nor a performance of the condition of the will (4).

(4) So held also in *Leigh v. Leigh*, 15 Ves. 92.

GAMMON v. STONE, December 7, 1749.

[339]

(Reg. Lib. 1749. fol. 132.)

Bill of surety in a bond to have it assigned after having paid its amount, dismissed with costs as useless. Right to principal and interest generally carries costs.—Tender must be very express and formal to prevent costs.
Costs. It must be an actual tender to excuse costs.

AN action being brought against the representatives of a surety in a bond, they brought a bill against the obligee, suggesting that they had applied to the defendant to receive his money, and had made a tender of it, and that the only terms, they insisted on, were that he should assign over the bond to them with a letter of attorney empowering them to use his name upon their giving him an indemnity; which he refused. The bill therefore was, that he might receive his money (1), and that they might have the bond assigned, and liberty to make use of it.

It was proved, that two bags were brought by the plaintiffs, and the money began to be counted out; but that the defendant who had agreed thereto before, changed his mind, stopped them, and said, he would not take the money upon the terms on which it was offered by them; though he had no objection to the security, and did not doubt but that the money was right.

LORD CHANCELLOR

Was of opinion, that the plaintiffs had no right to expect the assignment: and that it was not to be insisted upon, because it was quite useless.

It was then insisted for the plaintiffs, that they should not pay, but should have costs; for that a legal tender was made of the money to the defendant before the action brought; and the refusal of the assignment of the bond was a ground of coming into this court.

LORD CHANCELLOR.

The expence of this suit is owing to the plaintiffs, who have mistaken their way. If a legal tender was made, they need not come into this court: for it might be pleaded at law with an averment of being always ready. If a tender is not legal, a court of equity will not support it: nor supply a defect of a tender against a rule of law, unless perhaps where fraud is used to prevent it. Then the plaintiff is in the common case on payment of principal and interest; which carries the costs with it: there being few cases in this court where it does not do so. There are several cases of mortgages, in which though very reasonable proposals may be

(1) It appears the plaintiff had actually paid the money. R. L.

made, yet if no proof of an actual tender, the court on a bill to foreclose never refuses costs.

[340] BULLER v. THE BISHOP OF EXETER, Dec. 12, 1749.

Baron Clarke in the absence of the Master of the Rolls.

The privilege of the elder sister to present first in turn goes to her assignee.

THE estate of an advowson descended to two daughters as parceners; the church became vacant twice in their time, and both joined in presentation; the eldest marries, settles her own estate in the common way, and dies: the other daughter before it became vacant again, marries and makes a settlement of her part. A vacancy happening, *Buller*, the husband of the eldest, intitled to her estate as tenant by *curtesy* or under the settlement, claims as in her turn, and presents; but the bishop objects thereto, because the younger sister and her husband, claiming an equal right to presentation as tenants in-common, did not join: so that there being a litigation, he was willing to present the person appearing to have right in courts of law.

It was now made a mere point of law, whether the alternate turn of presentation among parceners continued to the grantee: i. e. whether the persons to whom the estate was conveyed are to be considered as enjoying the same privileges of presenting in turn, as the sisters and parceners, if they had their own estate.

Baron CLARKE.

I have always thought that the many alternate presentations in this kingdom must arise from estates descending in parceny, where advowsons are upon them: it is the only estate, I know, which in course, and by operation of law only, falls on several persons making but one heir; without the intervention of conveyances by will, or otherwise, of the owner of the estate, which makes it, although in some instances partaking of a tenancy in common, different from that and from a joint tenancy, which are made by conveyance, and descendible in a different manner. An advowson is a particular sort of an estate so descendible; and as it is impossible to be divided into parts, so as to be enjoyed separately, as it is natural to follow the course that has been practiced, that each parcener should have a turn to present, and to prevent confusion begin with the eldest. And in all the cases mentioned out of *Bro. Ab.* and *F. N. B.* where disputes arose; whether the alienee of the eldest sister should have the same privilege, or whether it should go to the next sister; it is determined in favor of alienee. They never were considered as tenants in common afterward; but every one presented in turn: agreeable to *Cr.*

[341] *El.* 19, and 2 *Inst.* 365: otherwise there would be great confusion; for the elder, either before presentation alienating the estate, would make all tenants in common, or waiting till her turn, then making alienation, and so defeat the other parceners. Therefore the alienation of the estate by a parcener does not for this purpose make them in the case of original tenants in common; but it still partakes of the nature of parceny. Then what *Buller* insists on is right; it is agreed, it would be the turn of his wife, if alive; so that the alienation makes no

difference. And if a precedent is wanted, the words of 2 *Inst.* are, that the privilege not only descended to the heir but to the assignee of each.

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WALMSLEY v. CHILD, December 11, 1749.

No relief in equity on lost instrument, where no affidavit of the loss, and no offer of indemnity (1). As to action on note payable to *A.* or bearer (2). And as to action on lost bond. Modern practice of courts of law in dispensing with *proferet*. This by no means destroys or affects the antient and acknowledged jurisdiction of courts of equity.

THIS cause came upon bill and answer; and the question was, what equity the plaintiff was intitled to upon the case stated, and facts admitted therein, which were these.

Charles Walmsley, in April 1742, lodged money in the shop of *Mr. Child and Company*, for which he took notes payable to himself or bearer. About nine days afterward he came to the shop and acquainted them, that he had lost the notes; believed his pocket was picked of them at play, and imagined he knew the person who did it: therefore desired, they would pay him the money, as the notes were not negotiated, but only lost. They answered, they were ready to do so, if he complied with what was usual in all such cases, *viz.* to enter into a bond with sureties to indemnify them. He submitted thereto; but never did it, advertising them for several days in the papers: and so it rested till his death.

This bill was brought by his widow and administratrix, insisting, that these notes must be taken to be lost, and that after this length of time there is a presumption of it: and that the defendant had no right to insist on security against so plain a demand. The plaintiffs having a clear right, must have a remedy; and therefore proper to come here, the accident of loss giving this court jurisdiction. The defendant runs no risk therein. No action could be brought against *Mr. Child* by a person finding the notes; for the legal right being vested in *Walmsley* and no other, his name, or the name of his representative must be made use of in such action; and then a release by the representative reciting the accident, would be a bar to that action. But the statute of limitations has barred; which might be pleaded in an action at law by such a bearer, or in a bill in equity; for goldsmiths notes are within the statute of limitations as well as bills of exchange. Nor does this case concern promissory notes only, but all other deeds and writings. These notes are as cash: and not to be presumed, that any person having them would lie by as in [342] the case of a bond, which carries interest. In a bill for payment of a legacy the court does not now require security to be given, though the practice was so formerly; and yet there may be debts standing out.

For Defendant. These notes are undertaken to be paid by the goldsmith or the banker to the bearer, whenever demanded; so that they never raise a credit in their books with the person named, who is not considered as intitled thereto, unless he has the notes to produce; without

(1) Vide 6 Ves. 812, 813, and 9 Ves. 464.

(2) *Askew v. Poulterers' Company*, post, 2 Vol. 89.

which he has no right at law; for he cannot bring an action for so much money had and received to his use; because from the nature of the contract, the bearer has a right to demand it. These notes by constant usage are as cash; and as such passed in a late case of a devise of all the money in his house. Then it is of consequence to this kind of credit and to the public, who receive advantage therefrom, and the faith and value of them should be kept; and though stopping payment is not the same as an act of bankruptcy, it might be followed therewith, and hurt the credit of the bank. The sale of such a note is an absolute sale of all the property of it, *Comyns*, 57; so that there is no want of assignment or conveyance thereof: but the very delivery over by purchase or gift passes the material property; and from the terms and import of the contract, the defendant is not bound to pay but to the bearer. Then it is contradictory to the rules of law, to say the vendor by any act can alter the right of vendee: the release therefore will be no avail. As little will the statute of limitations be any security to the defendant, this case not being within it; for the notes not being for value received, which words are never inserted in common goldsmiths notes, but payable on demand, the statute of limitations does not run till demand and refusal: nor can there be interest by way of damages till then. But the statute of limitations is stopped by acknowledgment of the debt, which the defendant has all along done; and will take it out of the statute. If then a risk must be run, the plaintiff ought rather than the defendant to run it, from the gross neglect at least; nor is there any affidavit of the plaintiff's not knowing what is become of them. The defendant swears by his answer, that notes have been brought to him after thirty years, which he has paid; and that upon inquiry of the most eminent bankers, the constant custom is, never to pay where the note is not produced, but on such terms; all which must be taken to be true, therefore it is not unreasonable, especially as a person coming into equity must do equity. In *Glyn v. The Bank of England* (1), November 16, 1741, after the death of *Nicholas Harding*, a list of bank notes in his own hand-writing were found, some marked as received by him, others as not received; the executors [343] applied to the bank for the latter; and offered to have the money laid out in security to wait the event; the bank said they never did that but where it appeared, that the person who applied was owner, which did not appear; for they were common bank notes, and nothing but that list to shew his property. Your Lordship held it a hard case that the bank should retain this money, and ordered it to stand over for the bank to consider of it; and 18th December directed an issue, to see whether they were his property or not. *Tercese v. Geray*, *Finch Rep.* 301, is applicable: so are the cases of inland bills of exchange upon the statute 9 and 10 W. 3 c. 17.

LORD CHANCELLOR.

Two questions arise on this case. First, whether it appears clearly, that the plaintiff has right either in law or equity to the money due on these notes. Then secondly, supposing such right, whether she has pursued the proper remedy? It is certainly of great consequence to the credit

and general negotiation of notes of this kind ; and therefore whatever circumstances of compassion and difficulty upon the plaintiff, the court must consider the case in general, and not be induced lightly to carry this case so far, as to make the defendant risk a second payment.

As to the first question, the original right appears clearly by the answer to have been in *Walmsley*. The terms upon which the defendant insists, being usual, it is certainly a reasonable rule to go by ; but whether they have a strict demand thereto in all cases is another consideration : the defendant admits, that *prima facie* the legal right to recover this money appears to be in the plaintiff : and his objection from the import of the contract, being payable to bearer, and no want of assignment, &c. is carrying it too far to say in any case ; for undoubtedly one's having lost his note or security, is no reason why he should lose his debt. But a note lost in that manner is a strong reason why the defendant should hold his hand and receive the fullest satisfaction, that it would never be demanded of him. Where it is payable to him or bearer, the bearer of the bill or note has not such a property as that he can maintain an action at law in his own name, but it must be in the name of the payee or his representative. But it must be considered in another light. The contract of the party is, that it should be paid to the bearer of the bill : it is a promise on the part of the drawer of the note to pay to the person named or bearer, therefore the bill must be brought, whoever demands the money, and the import of the agreement on the part of the payee is, that payment, to whoever brings the bill or note, shall be a discharge, and may be given in evidence against him ; which is a very material consideration in this case : and therefore it behoves the defendant to have absolute certainty, or see the note, before he pays. If, upon payment a release is given of all [344] demands upon these notes, no action could be but in the name of *Walmsley*, and this release may be pleaded : so if a judgment at law by *Walmsley* ; that may be pleaded at law, and would be a discharge in another action. But a consideration occurs, that if any person came to these notes for valuable consideration, though they kept them in their hands for seven years, and afterward brought a bill, whether this release would do in such case ? All the circumstances would be then considered, viz. that the property passes to the bearer of them, and how long from the course of business such notes may lie out ; that they may go to all parts of the world, and may lay out several years ; and it highly concerns the credit of them not to refuse payment. Then if a bill is brought by a person proving he gave valuable consideration for them, and a release only shewn upon payment and suggestion of loss without proof of the loss, would that be a defence ? It would be a very precarious one. If actual proof of their being lost or stolen, it would be a different consideration : but here is no proof, the publishing the advertisements is none, nor a presumption. Then what is sworn by the answer, is material, and must be taken to be true, as not replied to, of the account given of it by *Walmsley* to the defendant : which was a strong reason for the defendant to stop his hand ; for *Walmsley* ought to have pursued the person suspected. How is this case altered by length of time ? Seven years are passed which would at law create a bar ; but not here ; because of the confession and offer of the defendant to pay on terms : which would take it out of the statute of limitation ; for though it was long doubted whether a bare acknowledgment to pay would do so,

it is not now disputed; and it is also sworn by the answer, that these notes have been brought on them after thirty years.

The next question is, whether the plaintiff, supposing she has right, has pursued a proper remedy? And I am of opinion, she has not pursued such a remedy as should finally determine the case between the parties. It is said, she comes properly to be paid, as upon the loss of the notes. It is certain, that in case of a legal demand, as the present is admitted to be, there is no other rule of evidence upon the payment of money upon a loss, than there is at law, but that in all cases at law, except in one, the party may be remedied on proof of law, just as he may here, provided reasonable evidence of the loss (*r*); courts of law not requiring more than courts of equity, strict and positive evidence of the loss; which, as it is generally occasioned by negligence, is seldom capable of being given; but both admit evidence arising upon circumstances, and upon that, the party is intitled to recover. * But there are cases, upon which you may come into equity on a loss, though remedy may be at law; and one is clear upon a bill for discovery. But if you come into equity not [345] only for discovery, but have relief, on the foundation of loss, that changes the jurisdiction. And there are but three cases in which you are intitled to do that; in every one of which you are obliged to annex an affidavit to the bill to prove the loss. If the deed or instrument upon which the demand arises is lost, and you only come for discovery, you are intitled thereto without affidavit: but if relief is prayed beyond that discovery; to have payment of the debt, affidavit of the loss must be annexed; for that changes the jurisdiction. If the deed lost concerned the title of lands, and possession prayed to be established, such affidavit must be annexed. Another case is of a personal demand, where loss of a bond, a bill in equity on that loss to be paid the demand: there a bill for discovery will not be sufficient, but it must be to be paid the money thereon; but an affidavit must be annexed. [See post, 392, 3.] The reason of the difference between a bond and a note is, that in an action at law a *profert in cur* (*s*), of the bond itself must be made (1); otherwise *oyer* cannot be demanded by the defendant; and if *oyer* is not given, the plaintiff cannot proceed. But that is not necessary in the case of notes; no *oyer* is demanded upon them, the proving the contents being sufficient; and nothing standing in the plaintiff's way. Another case, in which you may come into this court on a loss is, to pray satisfaction and payment of it upon terms of given security. In an action at law, the plaintiff might offer, but the defendant could not be compelled to take, but in equity, that would be consideration, whether they were reasonable. That was the case of *Teresy v. Gory*, as Lord Nottingham has taken the name in an authentic record I have of it; which was *Easter*, 28 C. 2.

(*r*) Evidence the same in equity as at law, as a matter of fact. 2 Vol. 41.

* In general though a legal demand cannot be turned into an equitable one, yet in a demand of assets, plaintiff may come in here for satisfaction, though he has a remedy at law to avoid the inconvenience of doubly suing, as he is intitled to an account of assets in this court, and then, instead of sending him to law for satisfaction, he will get complete remedy at once. 2 Ves. 106.

(*s*) 2 Vol. 41.

(1) After Lord Hardwicke's time, the court of law dispensed with *proferts*. As to which see 6 Ves. 812, 813.

where a bill of exchange was drawn on the defendant, and indorsed in the third place to the plaintiff, by whom the bill was either lost or mislaid, as appeared by the affidavit annexed. And the bill prayed that the defendant might be decreed to pay the plaintiff the money, as last indorsee, according to the acceptance; the plaintiff first giving security to save the defendant harmless against all former assignments; which was so decreed, but without damages and costs. In a book called *Finch's Reports*, 301, the decree is somewhat larger, and the acceptance of the defendant was after the third indorsement, and it is in that book, though not so in the manuscript report; and indeed I do take it to be as in the book; and then there is no doubt of the plaintiff's right: but if that be material, it shall be inquired into: in that case if the plaintiff could at law prove the contents of his bill, and the indorsement, and the loss of it, he might have brought his action at law upon that bill without coming into this court; but he was apprehensive, the course of trade might stand in his way at law, and therefore came into this court upon terms, submitting it to the judgment of the court, whether they were not reasonable. So was the case of *Glyn v. The Bank of England*, the plaintiff submitting to give security; which was, what a court of law could not take [346] into consideration: whereas the present expressly opposes the giving security. The result therefore as to the remedy is, that it is a bill in this court to have a decree for a plain legal demand, if the plaintiff is in the right, without other circumstances; and no affidavit annexed to the bill of the loss of these notes; and no evidence besides presumption. It may be said, that the rule of this court for annexing an affidavit to a bill is in the case of loss of deed; and that in general is so: but I see not, why it should not be required in the case of any instrument, if you come into this court to change the jurisdiction, which is the ground upon which the court goes, and then in the case of the loss of a note it is the same. And in *Teresy v. Gory*, the bill was so brought; an affidavit being annexed: although security offered; and weight was laid thereon by Lord *Nottingham*. That this is a legal demand, notwithstanding the loss of the note, is clear, and perhaps the easiest way that can happen; for the plaintiff may go two ways to work. If the plaintiff can prove the loss, she may declare on the notes: but to get rid of the proof, she may bring an *indebitatus assumpsit* for money had and received, &c. for payment into the defendant's shop is admitted. The reason of making the statute 3 and 4 of *Anne* arose from some determinations in the beginning of her reign by *Holt*, C. J. that no action could be maintained on a promissory note, nor declaration thereupon, viz. *Clarke v. Martin*, and *Potter v. Pearson*, 1 *Sal.* 129; which cases produced the act, as the act itself recites: but that act of parliament did not alter, but that still an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved if lost; nothing standing in the way, as there would in the case of a bond. Then supposing an action by the plaintiff against the defendant for the money, which is admitted to be paid into the shop, what will stand in her way of recovering, but what ought to stand in her way? It will then be for the consideration of the court, how far the course of trade ought to stand in her way: and to that remedy I shall leave the plaintiff. As to the act relating to the inland bills of exchange, it deserves to be taken notice of. Before the *Stat.* 9 and 10 *W* 3. there was a great difficulty

about recovering upon such bill. The matter therefore being uncertain, the merchants procured that act; the nature of the provision thereby being, that if an inland bill of exchange, payable to himself and never indorsed be lost, and he comes to the person drawing, he is not bound to pay without security given in case the bill be found: and yet what danger could there be in general? For if a bill is payable to *A.* and *A.* makes affidavit and shews the loss, and the bill never indorsed, there is little danger; because it is common among merchants to draw several bills, *viz. pay the second, first not paid*, which is a security, and is the constant course of merchants. Then consider the intent of the 3 and 4 *Anne*, relating to promissory notes: the title of the act is to give the same remedy, and make these notes of the same effect, as inland bills of exchange. And this practice of the bank and the goldsmiths, has

[347] taken rise from the provision made in that act of parliament: for it is equally dangerous to them to pay, without having the promissory note delivered up, as in the case of the inland bills. Then if I am to act by my discretion, I see no ground to depart from that: this is not a case, in which there is a probability of great hazard: nor do I think, the defendant, if it was not for the sake of the precedent, would lay so great weight upon it; for from the length of time it is natural to think, there is no risk. But if there is any, I am not to let the defendant run it: and there is a suspicious part of the case, from what *Walmsley* said and did.

Upon the whole therefore, the plaintiff must bring an action at law for the money; the bill shall be retained: and then the matter will be properly tried, and a court of law will take in consideration, how far the course of trade and manner of negotiating these notes are to go. It is now established, that if a goldsmith's note is taken, and kept beyond three days, and the goldsmith breaks, it is the party's own fault for keeping it longer, though there is no act of parliament concerning that; this therefore is proper to be determined by a jury, as that was.

For plaintiff. It has been doubted, whether the plaintiff can maintain an action; therefore an issue ought to be directed, so as to clear it of all collateral matter.

LORD CHANCELLOR.

I see no doubt of maintaining the action: nor is there any thing in the answer that will bar it.

But if the plaintiff does not proceed in the action for this money, let the bill be dismissed with costs.

SCHELLINGER v. BLACKERBY, December 16, 1749.

(Reg. Lib. 1749. B. fol. 114.)

The grant of a menial office in the House of Lords for a term of years, liable to creditors, and a daily fee or allowance, held to be also subject to their demands.

It having been determined by his *Lordship*, that the office of taking care of the Palace and the House of Lords, granted to *Blackerby*, his executors and administrators, for thirty-one years, should be subject to his

debts, it was referred to the Master to see, what were the profits of that office.

On exception to the report, the question was, whether a fee of six shillings and eight-pence a day (which was an allowance made by the *Lord Chamberlain's* warrant to *Blockerby*, for the purposes of making clean and sweeping the Royal House and Palace, and the chimnies, removing and placing the chairs, forms, &c. in the House of [348] Lords) should be held as part of the profits of the office; it being said to be a voluntary allowance of the crown by way of satisfaction for particular expences in paying labourers, &c. and that it may be varied; therefore no part of the office.

LORD CHANCELLOR.

It would be very extraordinary if this should not be subject to the creditors satisfaction. In the bankrupt acts, officers are expressly named as subject thereto. It is clear, that this six shillings and eight-pence a day is part of the office and liable to creditors. It is true it may be varied: but it is not pretended but that it is an allowance paid time out of mind; nor shewn to be a new and particular bounty; nor objected that it has not gone with the office. If indeed it could be said to be money laid out of his pocket, there would be no ground to consider it as part of the office; but it is not so. The words of the grant are *cum omnibus aliis Vadiis, feodis, proficuis, commoditatibus*; which must take in something more than what are particularly there mentioned: and there is nothing more than this to be taken in. It was intended to be so; and the words are proper for it. If not thus considered, it would be vain for a court of equity to hold any office to be subject to creditors; for there are several offices, whereof the greatest part arise from a particular warrant from the crown: which if struck off, the other parts of the office would be worth nothing.

Lord HARDWICKE, *Lord Chancellor.*

Lord Chief Justice LEE.

Lord Chief Baron PARKER.

Mr. Justice BURNET.

RYALL v. ROWLES, Jan. 27, 1749-50.

S. C. 1 Atk. quod vide, with Mr. Sanders' notes.—Pawnee of goods, &c. permitting bankrupts to continue in possession, or in the order and disposition of them, have no specific lien on them against the assignees.

Assignments of debts(1).—Equities as between partners.

WILLIAM HARVEST, a trader within the several statutes concerning bankrupts, in June 1732, borrowed from *Benjamin* and *Joseph Tomkins* £1500, and as a security conveyed and assigned his dwelling-house and brew-house at *Kingston*, and all the coppers and utensils in trade belonging thereto, by way of mortgage, subject to redemption. He afterward took *Jonathan Stephens* into partnership with him; and in less than a

(1) See p. 353.

month after the partnership, *December 22, 1736*, made a second mortgage to *Potter* in trust for *Jonathan Stephens* of his moiety of not only the utensils, but the stock in trade, debts, profits, &c. for securing a sum of money, then lent to him by *Jonathan Stephens*, and any future sums that should be lent. *December 10, 1737*, he made a third mortgage, of the seventh part of his undivided moiety of all the stock in trade, utensils, debts due or to grow due, to *Sir James Reynel*. *April 24, 1738*, he made a [349] fourth mortgage of the seventh part of his undivided moiety, with the same description, to *Skip*. *September 7, 1738*, he made a fifth mortgage to *Jonathan Stephens*, for securing to him £2000 which *Stephens* had paid to one *Baugh*, who had the original mortgage on the freehold estate; the real premises which were conveyed by way of lease to *Tomkins*, having been mortgaged to *Philip Stone* in 1725, and assigned to *Baugh*, who assigned to *Stephens* upon being paid the £2000. He afterward made a sixth mortgage to *George Harvest* his son, of the seventh part of his undivided moiety of the partnership, stock in trade, debts, utensils, and profits, in consideration of a sum of money lent.

Notwithstanding these several mortgages, he continued in possession of the utensils and stock in trade as before; altered, disposed and mortgaged them as his own, and received the debts in partnership with *Stephens*, without any controul from any of the mortgagees till 1740, when he failed and became bankrupt.

Then the assignees and mortgagees insisted on the right of the several goods, stock, &c. comprised in their several assignments, in opposition to the general creditors claiming under the commission.

The cause was heard before *Lord Chancellor*, the *Seals* after *Michaelmas 1747*: and it being a new case, his *Lordship* ordered it to be argued by two counsel on each side, assisted by the *Judges*, upon the question whether all, or any and which of, these mortgages came within the *stat. 21 J. 1 c. 19*, particularly the latter part of the tenth, and the whole of the eleventh section or not? It was argued *February 24, 1747-8*.

Solicitor-General and *Mr. Noel*, for the Assignees under the Commission.

The question upon the construction of this statute are two. First, whether any conveyance of goods or chattels by way of mortgage, or with condition of redemption, is within that statute? The second, if the court should think so, whether any of these six mortgages are within the clause as to any of the goods comprised therein; the consequence of which is, that they must be as creditors under the commission, and not be preferred to the other creditors?

[350] The first will depend on the true construction of the act itself; to find out which three things are to be resorted to. The circumstances at the time of making the act; for to them the law was adapted: the remedy intended, and the mischief designed to be prevented thereby: and judicial explanations of the act since. It will appear, that some conditions of redemption are within this clause, and that it was calculated for this. When this act was made, fraudulent conveyances were sufficiently guarded against by *13 Eliz. c. 5. s. 7 Twine's case, 3 Co. 80.* upon the construction of that act, was considered so strongly within it, that the par-

ty was punished criminally: and particular provisions are made by that statute in case of bankruptcy. Fraudulent conveyances then, being provided for before, were never intended by the act now in construction: but the thing intended was an equal distribution amongst creditors: which was very unequal, some creditors getting prior liens several ways: as by bond, judgment, &c. to take away which priority, unless where satisfaction by execution and recovery before the bankruptcy, was the intention of the act; and to reduce creditors, who had trusted the bankrupt generally, to equality. Another way creditors had of gaining a priority, was by pledged goods; and after that a new way, by conveyance without delivery of goods. Anciently, as appears from the *year books*, 5, H. 7. f. 1. Delivery was necessary to a sale: and was often done by parol: the pledge must be delivered over to the pawnee himself at the time of borrowing, otherwise no property vested in him. But that doctrine was afterward exploded: as in *Yel.* 164. and 2 *Leon.* 30. *Clarke's case*, where the property was held vested, though no delivery at the time. And *Owen*, 124, held, that such pawnee might assign over his property; so that wherever the conveyance was under hand and seal, it was not necessary to vest the property by delivery of goods pledged: there is no real distinction between the words *mortgaging* and *pledging*; the first being generally applied to lands, the other to goods; and they are in effect synonymous terms. As to lands, the mortgagee holds by title: and the title deeds always are, or should be in his possession; but as to goods there is no hold, where the pawnor keeps them in his possession. The end of the act therefore being to reduce creditors to equality, it is but reasonable to put such creditors, who took pledges and left them in the hands of the bankrupt or pledger, to dispose of and alter them as he pleased, upon equality with other creditors; for the mortgagees give the bankrupt a general credit. Suppose a diamond pledged for a large sum, and pawnor keeps possession of it: if he sells the diamond, as he may do the next day, the creditor must come in under a commission. The inconvenience in allowing a preference in cases of these secret conveyances is greater than that of judgments, which are public and open: not that the act intended to restrain the pawning and selling goods generally: and there might be a sale of goods where [351] possession could not be given: as of ships at sea, and goods, and merchandise that are bringing home. Such conveyances then by way of mortgage are within the reason of the act: and the question is whether within the letter? The word *convey* in the preamble extends to all conveyances in general, whether absolute or by condition; mortgages of lands or goods are in this act called *conveyances*: and where a general word is mentioned to take in all, it is not usual afterward to specify particular words which come after it. The mischief recited in the preamble is material, *often happening*. It never was a frequent practice to buy goods absolutely and leave them in possession of the vendor to do as he would with his own, which case never happens without fraud: and the preamble supposes a good consideration not upon fraud: against which case, if the legislature had intended a provision, it would have put it upon that. But they knew that would be void by 13 *Eliz.* and were therefore providing against conveyances by way of mortgage, the mortgagor keeping possession and exercising all acts of ownership. The enacting part is very carefully penned; and every word deserves to be weighed; the goods

must be originally the property of the bankrupt, and conveyed by him, and must continue in the order and disposition of the bankrupt. It is objected, that mortgagee or grantee on redemption cannot be called owner or proprietor: but the act considers him as such: the words take in all ownerships whatsoever; some for greater interests, others for less: and the pawnee or mortgagee is in point of law considered as proprietor, and may maintain *trover* upon it, although that action is founded in property. Such conveyance by pledge has been held to be good against extent of the crown, because the property is altered. 3 *Bul.* 17, shews, that pawnee has a special property, so that no act of pawnor can affect it by outlawry or felony. So if a lease for years is made of goods, a *scire facias* for the king upon a subsequent outlawry shall not affect them till the lease ended. It is objected that the word *true* is added to *owner* or *proprietor*, and that mortgagee never was deemed such; but *true* is never put in opposition to *special*, but *false*, owner, and so meant in this act. It is said that mortgages are allowed and excepted out of the act: power being by another clause given to the commissioners or assignees to redeem; but though a trader may mortgage, his goods must be delivered to the mortgagee or in the hands of a third person, and not remain in mortgagor; beside, that clause only gives the same power the assignees had before, in place of the bankrupt. As to judicial expositions upon this statute since, it has been held, that the preamble shall be taken into construction, and the enacting part controuled by it. So held by *Holt*, Chief justice, in *L'Apostre v. L'Plaistrier*, cited in 1 *P. Wms.* 318.

[352] *Lee*, Chief Justice. My account of that case is different from that in 1 *P. Wms.* evidence having been given of the alteration of the diamonds by taking them out of the sockets. It was held by the court, that offering to sell generally was sufficient evidence of offering to sell as owner; but no judgment was given; it being adjourned for further argument, although the court said, if this was not within the act, they knew not, what was. I had occasion to cite this case before Lord *Raymond* at *Guildhall*, and it was then said, there was no determination upon it.

LORD CHANCELLOR.

I have seen another note of that case; and it appears to have been argued a second time, when Sir *Edward Northey* took the distinction, that the enacting part was controuled by the preamble. Search was directed to be made for the rule: which was found; and this matter was determined *Pas. 9 Anne*; but whether upon the point in question or no did not appear.

For the general assignees. In August 1774, *Ex parte Marsh* (1), his Lordship held, that plate in trust for benefit of the wife was not within the statute, not being of the bankrupt, or conveyed by him. The preamble then makes part of the enacting clause, and is the key to it, 1 *P. Wms.* 317; notwithstanding the general act of parliament may take its rise from a particular case; and ought to be construed to prevent the mischief and advance the remedy. The question of the mortgage of goods being within this act of parliament has been in judgment before. The case of *Stephens*

v. *Sole* (2), July 5, 1736, which was solemnly argued, is in point. There *Wm. Tappenden*, indebted to the plaintiff £1400, for securing payment thereof mortgaged to the plaintiff some leasehold estates, wharfs and three hoys, but kept possession of the hoys, and some time after became bankrupt. The plaintiff brought an ejectment, and got possession of the leasehold estate, but the assignees got the hoys. The leasehold not being sufficient to pay the plaintiff his principal and interest, he brought a bill to foreclose, and to compel the assignees to redeem the hoys, or that they might be sold to pay his demands. The assignees admitting the leasehold not sufficient to pay the plaintiff, insisted on their right to the hoys under the statute; the bankrupt having the possession, and acting as owner thereof till declared bankrupt. Lord *Talbot* decreed, that the plaintiff might be at liberty to come in under the commission for his deficiency; dismissing the bill so far as it required account of the profits of the hoys; which were ordered to be sold for the benefit of the creditors in general. No case has since occurred where it was held that a mortgage by way of condition is not within this clause: and wherever it has come before Lord *Chancellor* with proper facts so as to create a doubt, it has been sent to be tried: as in *Borne v. Dodson* (3), 5 December, 1740, but it never was. So upon the bankruptcy of *Raymond*, *ex parte Page*, where the mortgagees gave it up, coming in under the commission. [353]

If then any, or some, mortgages may be within this act, the second question is, whether the six mortgages, or any of them, are within the statute? Which will depend on three considerations; the nature of the chattels; the interest conveyed; the persons to whom, or for whose benefit, they are conveyed. The chattels are stock and utensils in trade; the debts due and to be due; and yet possession of the whole left with the bankrupt; who had the order and disposition of them as before; sold, altered, and disposed as owner; was reputed as such: and all this with the express consent of the mortgagee, who might have prevented this; the nature of the conveyance being so. Nor was he to account with the desponsee for what he should sell, nor for any of the debts he should recover; for that might probably have altered the case. As to the specific goods that were to be, the assignments of them are merely void at law, and only to be supported in equity by way of agreements to be performed when the goods come *in esse*; this court considering it as done from the time it ought, whereas courts of law only give reparation by damages. As to the debts, present and future, they cannot be assigned at law; and in equity it can only be supported, where the assignees have a proper power to sue for, recover, and receive the debts assigned (4). Whereas here the bankrupt after conveyance is to sue, &c. and not to come to any account. And debts come within the words and meaning of the act, within the word *chattels*, and would pass in a will thereby. As to the interest conveyed, they are all, except one, shares of the stock: and the act requires delivery, and that possession should be altered. The mortgagees of part ought to come into the trade, and act as part-owners, and then it will be notorious, who are the true owners: which answers

(2) Cited 1 Atk. 157. 161. 170.

(3) 1 Atk. 154. and see post, 2 Vol. 272, &c.

(4) Vide 9 Ves. 410.

the objection, that delivery could not be given of parts of the goods. As to the persons claiming the benefit of the assignments, it must be admitted, that each partner has a pledge on the partnership effects for what is due to him upon adjusting the account, and the surplus must be divided (5): but here the money advanced by *Stephens* has nothing to do with the partnership; being an entire separate loan; and if this is suffered to stand against the rest of the creditors, it will elude all the act of bankruptcy, for most trades of the city are carried on in partnership. *Stephens* was after the conveyance owner of the whole, redeemable as to one moiety; yet *Harvest* continued to act in the partnership, sold and disposed of his moiety, as he pleased. Then as to the general expediency, the policy of the law has been always to level creditors except such as have recovered satisfaction, or got such possession, as cannot be defeated: whereas if this method of mortgaging were allowed, one or two favourite creditors would sweep away the whole: nor would creditors know what to trust to. Trade cannot be carried on without credit, which would be destroyed if such liens are allowed to give a priority: and for above a century have the legislature been guarding against it. It is no injustice to turn aside such mortgagees, who trust the credit of the bankrupt, and would in cases of insolvency set up their conveyances to defeat others, who were induced to trust on the credit of his stock and trade; not indeed that all mortgages of goods without delivery are void; as of ships or cargo at sea; but then every thing is done to enable the taking possession upon arrival, as invoices, bills of lading, &c. So in case of bulky goods delivery of the key of the warehouse to the mortgagee: but these cases fall not within the act, nor the mischief intended to be remedied.

Attorney-General and Mr. Wilbraham for all the mortgagees.

The general question is, whether any, and which of these mortgages or securities, under which the several defendants claim, are made void in the whole or in part by 21 J. 1 c. 19? Upon which two considerations arise. Whether the particular interest, claimed by the mortgagees in goods, be such as made them true owners within the clause of that act? Secondly, as to the goods assigned, what possession could be given? The true view of the laws relating to bankruptcy, is, that all conveyances to defeat creditors shall be absolutely void. The real ground of the conveyance was to be inquired into to rebut the general charge of fraudulent conveyances: and it would be an odd construction, that in all events, although a valuable consideration were paid, it shall be absolutely void, because the possession was left in the conveyer: though strong evidence of fraud, it was only evidence, and capable of being rebutted; and the consideration if good, was a strong evidence to be opposed thereto. The meaning of the act was to prevent false credit by a person having goods which did not belong to him; being sold absolutely. Not a word in the act about pledges, but only general conveyances. A mortgage is the appropriation of a specific thing to certain purposes; not only for payment of money, but for indemnifying on divers occasions. A pledge requires delivery of the thing: a mortgage does not. That they differ may be seen by *Justinian's Inst.*

Tit. 6. and by the definition of *Hypotheca* and *Pignus*, Bro. 271, *Trespas*, it is no pledge unless delivered at the same time. But mortgagor is presumed and understood to have possession: nor was the retaining possession ever evidence of fraud, where the conveyance was intended only as a mortgage, 2 *Bul.* 226. It is the same with regard to goods as to lands. *Chan. Pre.* 285, where a redemption was intended; the produce of goods may be granted as well as the goods themselves. The [355] words *owner* and *proprietor* are to be limited by the nature of the conveyance, and extends not to mean the real owner in all cases. Though the preamble is the key, Lord *Cowper* in *Copeman v. Gallant*, 1 *P. Wms.* 314, would not allow that the preamble should restrain the enacting clause. A factor, having goods sent him from abroad to sell, is not owner within the act: because, if he becomes bankrupt, the court will take the goods out of the hands of the assignees for the right owner. It is common to have general acts of parliament from particular cases, and sometime the legislature recites the particular, and sometimes a general reason: the preamble therefore, where general, ought to be considered with the enacting part; but where a particular reason is given, it would be odd to construe the remedy for that case only, and not take the act in general. The mortgagor is generally considered as *true owner*: so in common law courts, and in the acts concerning mortgages and the redemption of estates, he is called owner. The word *owner* is indeed sufficient to take in special owner; but that this act does not interfere in this case, appears from *Magot v. Mills*, 1 Lord *Raym.* 286, and *Jacob v. Shepherd*, cited in 2 *P. Wms.* 431. If possession was to be altered, it would in this case defeat the mortgage; for it was intended, that the trade should be continued, and not to put the mortgagee in possession. The nature of the mortgage was proper to have the possession kept in the mortgagor: therefore like the case of a leasehold estate for years; a mortgage of which, though a chattel, is not within the act, and there is a great distinction between the possession of goods being in the person who is real owner, and one who is only conditional owner. 1 Lord *Raym.* 724. As to the things assigned, it could be of no use to the mortgagee to take these utensils, being fixed to, and continued as part of the premises. A share in trade is a mere *chose in action*. 2 *P. Wms.* 427. *Small v. Oudley*. Some of the things are to be *in futuro*, and of which the mortgagees could not possibly have possession; this court will bind property which the law will not bind; and this act can affect nothing but what means a legal conveyance. If the general acts of parliament or the common law give not these kinds of debts or goods to the general assignees, this act cannot: and the mortgagees will have a lien and priority; not that the creditors of the partnership shall be hereby prevented; but the plaintiffs are private creditors; and these are only assignments of the residue, after payment of the partnership debts, of what shall be taken hereafter: which can be assigned in equity, but not in law. In notion of law, the possession of one partner is the possession of the other: it is common to have a covenant in a partnership that one partner shall not assign without consent of the other, and the assignee of part of the partnership effects cannot maintain *trover*; for the partnership may be given in evidence, and the assignee has no remedy but in equity. Had it been to *Stevens* instead of *Potter*, it could not have been [356] within the act; for there to all intents *Stevens* would have been

in possession. In the very deed the assignment is said to be in trust for *Stevens*; and then it will be presumed, that *Potter* suffered *Stevens* to continue in the possession which he had before, viz. real owner as to one moiety, and special owner as to the other. Then as to the exigencies of trade, money is often wanted at an hour's warning; and then it is frequent to borrow upon goods for a limited time; and if a man was in that case to put another in possession of his shop, or to deliver the key of his warehouse, it would be publishing himself a bankrupt to the world. Credit is a very tender thing; and if the method was to deliver possession in all cases, it would be so great an inconvenience as to destroy all credit and trust whatsoever.

Reply. The clause in this act extends indeed to absolute sales; but not to that case only. Allowing that the enacting part shall not be restrained by the preamble, yet that it goes as far as the case in the preamble can be no question; but whether it shall go farther? The case stated in the preamble, that *many convey* and still retain, is the present case; for in absolute conveyances it would not often happen without fraud. Chattels are no real pledge or security unless a delivery; it is otherwise in case of lands; the title being a security without the rents and profits. The distinction between mortgagee and pledgee is nominal only, and alters not the nature of the contract; the *Roman* law says, *hypotheca* and *pignus* are the same; so *Calvin's Lex*; and so is the nature of the contract.

LORD CHANCELLOR.

The power of a master to bind a ship is called *hypotheca* (1): yet there is no delivery of possession; and it differs from *pignus* or pledge.

Reply. It does so; but the master has a particular lien, by way of security for what might be due to him: and those cases are exactly the same as absolute sales, where delivery may not at all times be necessary. 2 *Bul.* 226, relating to mortgage of lands, is quite out of the case (2). The general proprietor here acts with consent of the special. *Hale* in his *Analysis* in his division of special property, says, that a pledge and grant on condition is a special property: the report in 1 *Lord Raym.* 286, has only stated some dictums: as to *Lord Raym.* 724, the fourth point, the only question was, whether the execution was fraudulent? not a mortgage by bankrupt, but the putting goods into the hands of another to sell on his account. In *Jacob v. Shepherd*, if the act had been thought of, that case was not within it; nor was it truly referred to in 2 *P. Wms.* 427.

[357]

LORD CHANCELLOR.

It was not. Sir *Joseph Jekyl* set aside the assignment of goods as fraudulent, without taking notice of this clause. But Lord Chancellor *King* was of a different opinion; because there was a consideration; and that he could not make a bankruptcy where the law did not. But the assignment being so extensive, he sent it to law, to see whether the assignment itself was not an act of bankruptcy; but still took notice of this clause.

Reply. Then *Small v. Oudly*, 2 *P. Wms.* 427, falls under the same

consideration: the present statute was not under consideration, nor could it be. No chattels were ever intended to be excepted out, but some chattels cannot come within the circumstances of the act: as leasehold, which are governed by the same rules as real estates. It is objected, that the act extends only to legal, and most of the things here assigned are equitable chattels; but where the act sets aside all conveyances, it means both in law and equity; and equity must follow the law. The only case in which, as to the rules of property, this court does not follow the law, is, that a widow is not intitled to dower out of a trust estate; which obtained at first without being attended to. Possession of debts assigned may be given by delivery of the securities, and by giving power to receive and recover: but here all those powers are left in the bankrupt, and to apply the debts to his own use. Certainly he, that lends money on goods in a ship, and takes not possession, will lend without that security, and on the general credit: for such goods, are really no security; because the moment they are sold, the lender becomes a general creditor. The line how far the act extends, and where to stop, is easily drawn, by the act itself; for where possession of the bankrupt is without consent of the mortgagee (3), it is out of the act: otherwise not. It is said, this will prevent assignment of stock in trade: but an absolute assignment of all stock in trade would hardly be good in cases of bankruptcy, even laying it out of this act: it was so said by the *Master of the Rolls in Small v. Oudly*: it being only ideal, and carrying a badge of fraud.

The court having taken time to consider, now delivered their opinion.

Burnet, Justice. This case is of so extensive a consequence to trade in general, it may be attended with such inconvenience either way, and in most respects is so wholly new, and no judicial determination, that I shall endeavour to lay my thoughts in as clear a light as possible.

On stating the case as far as it relates to the question, as it [358] stands on the pleadings and the *Master's* report, the general question seems to be, whether these six mortgagees, or any of them, will be intitled to resort to the utensils, &c. for a satisfaction of their debts? Or whether, like the rest of the creditors, they must come under the commission for a distributive share of those debts? Which depends on a more restrained question: whether these six mortgagees, or any of them, did not permit the bankrupt to continue in the possession, order, and disposition, so that by the statute J. 1. the commissioners were intitled to sell and dispose of these several mortgaged chattels for the benefit of all the creditors?

It is natural from the mortgages to consider this in three distinct lights. First the nature of the mortgage or conditional sale of specific goods, things in possession, of which there may be actual delivery, where the bankrupt continues in possession of these goods; and it is necessary to consider such mortgage to a stranger, and to a partner. Next the nature of three of these mortgages to strangers, as conditional sales of things partly in possession, as utensils and stock in trade, and partly *choses in action*, as debts and future profits. Lastly, whether the general rule will extend to it, supposing these mortgages to strangers are within the same rule as

(3) See *West v. Skipp*, ante, 239.

mortgages of specific goods, whether there is any difference between a mortgage to a partner and to a stranger? And although the present question must wholly receive a determination from the clause in the statute, yet it is necessary to consider conveyances to creditors before that statute.

But previously it is proper to clear the question with relation to pawns. It was contended, that pawns by the *Roman* and *English* law required delivery, but that *hypothecation* or mortgage did not. As to the *Roman* law, there was an authority cited, *Just. Inst. Lib. 4. Tit. 6, sec. 7*, which passage, if it stood alone, might go a good way to prove what it was cited for. But there is another *Roman* authority, proving *pignus* to be as valid without delivery: and the true distinction between them is only, that *pignus* is of moveables, capable of delivery, the other of immovables only. *Domat, Lib. 1. Wood, Lib. 3. chap. 2, 219. Digest. 50. tit. 16, Law 238. 13 Lib. Pandects, tit. 7. Law, 1. 20 Lib. Pandects, tit. 4, Law 12, § 10.* where a pawn to two, and delivered but to one, and where the pledge is concurrent in point of time, the preference to the person, to whom a delivery is stated there, that he will have a better remedy by way of action than the other. Delivery then is not necessary by the *Roman* law: and the other nations receiving this *Roman* law corrected the inconvenience of this law as to that point that if a pawn is not delivered, it shall not affect a purchaser for valuable consideration, as it certainly did in that law. But supposing that distinction true, it could have no influence in the present case, unless the *Roman* hypothecation and *English* mortgage were the same; which they are not. No property was transferred in the hypothecation: an *English* mortgage is an immediate conveyance, with power to redeem; and equity at any time admits redemption, notwithstanding forfeiture; but that does not alter the conveyance, therefore there is no comparison between them: and in the *Roman* law there is a place where it is held, that suppose there is an hypothecation, with condition that if the money is not paid at the day, the pawnee shall enjoy the goods: that is a conditional sale. *Just. Code, Lib. 4. tit. 54, Law 2*, and the same *Liber* of the *Code* relating to conditional sales of moveables, *Law 7*. All that can be inferred from the *Roman* law with respect to pawns and hypothecation, will be foreign: and from the *English* law, as to pawns, as foreign. I admit delivery necessary to a pawn: the year book cited, 5 *H. 7*, is an express authority in point; and therewith agrees 2 *Rol. Rep. 239, Ross v. Bramsted*, that it is no pawn where no possession is transferred at the time, 2 *Leon. 30*, and *Yel. 167*, are cases not of pawns, but bailment to third persons to sell goods for the use of a particular creditor, who will have an interest in the performance of that contract, and may sue the bailee; which has nothing in common with the case of a pawn. All the books treating of pawns, treat them as in the possession of pawnee; where a pawn is compared to distress, and suppose that the custody of the pawn must be in the pawnee. *Owen, 123, 2 Lord Raym. 917. 2 Salk. 522*, but there is one case more, where the proper distinction between mortgage and pawns is taken. *Ratcliff v. Davis, Noy. 137 Cr. J. 244. Yelv. 179. 1 Bul. 29*. where the court held, there was a special property in pawnee, intitling to the custody till the condition is performed: but that on payment the whole property vested in pawner; distinguishing it from a mortgage, which is a conveyance of the thing;

that therefore must be laid out of the case, because it has nothing in common.

(x) The next consideration then is, in what condition the creditors stood, in relation to conditional sales or mortgages by their debtors to their prejudice, where the mortgagor continued in possession of the goods mortgaged: and the statute governing this matter is 13 *Elizabeth* (1). in which there is no distinction between conditional and absolute sales, provided they are fraudulent. This statute being made to protect creditors against all conveyances to defraud them, it was incumbent on a court of equity, or a jury at common law, upon considering the whole circumstances to pronounce whether the conveyance was made with such intent or not. Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud, where left in his hands. But if from concurrent circumstances it appeared, the title-deeds were not left to defraud creditors, but upon reasonable and honest purposes, or left with the vendor, nor so as to deceive touching his substance, that being [360] accompanied with other circumstances, could not be pronounced a badge of fraud. Therefore it lay open upon this to determine whether fraudulent or not. The leading case on this is *Twine's* case; where it is held, that it was upon a valuable consideration, but not *bona fide*, from the continuing in possession, and trading therewith. It is difficult, unless in very special cases, to assign a reason, why an absolute or conditional vendee of goods should leave them with vendor, unless to procure a collusive credit; and it is the same whether in absolute or conditional sales; neither the statutes, or the reason of the thing, making any difference. If no delivery is necessary on a mortgage, they may be mortgaged three times over, above the value; and then it is just the same, as if they remained in his hands after one absolute sale. But it is insisted, there are several cases, where there is a distinction as to this possession after sale between conditional and absolute conveyances of lands or goods. That of lands is not applicable to a case of goods: the case cited for this was *Stone v. Grubham*, 2 *Bul.* 226, and 1 *Rol. Rep.* 3, but no argument from thence, unless the possession of lands and goods after a conveyance was on the same foot. Possession is no otherwise a badge of fraud, unless as calculated to deceive creditors. There is no way of coming at the knowledge of who is owner of goods but by seeing in whose possession they are: the possession of lands is of a different nature; there may be a possession as tenant at will; as every mortgagor is of a mortgage before the condition is broken. Every one desiring credit intitles the other party to an inquiry into his substance; and therefore because the possession of land is of an ambiguous nature, as it may be in the hands of the tenant, as well as the owner, the title-deeds, &c. may be required: but never at what market goods were bought; the possession and *usure* of them being all. Therefore in equity, where deeds are left with a second mortgagee, and the first mortgagee neglects to take them into his possession, the first mortgage is postponed (2). The reason is given by Lord *Talbot* in *Head v.*

(x) 1 *Brown*, 125.

(1) 13 *Eliz.* ch. 5, which relates only to *creditors*; the 27 *Eliz.* c. 4, relates to *purchasers*.

(2) There must be some mistake here. It is *not* a general rule that a second mortga-

Egerton, 2 P. Wms. 280; he suffering for his fraud. The next case cited for this was *Bucknal v. Royston*, Chan. Pre. 285, but no distinction was taken there between conditional and absolute sales by Lord Comper: but that there was no evidence in a case before him of a possession calculated to acquire a false credit, which would make it void. The next case in support of this distinction was *Magot v. Mills*, 1 Lord Raym. 286, and *Cases in the times of King William*, 159; from both which books it appears, the case was so imperfect that the court sent it to a new trial. What reason weighed with *Holt* is not clear; but it is clear, that it was not this distinction: distinguishing only bills of sale to a landlord from any other creditor. But though from all these cases it does appear, [361] that in the construction of the 13 Eliz. there is no distinction between conditional and absolute sales of goods, if made with the intent to defraud creditors, yet a court of equity or a jury are left at large to construe whether it was made with such intent or not.

Then to consider the statute of 21 J. 1. c. 19. the 10th section is by misprint connected with another part, to which it has no connexion, when it is the preamble to the eleventh; no distinction is made in this preamble between absolute or conditional conveyances; nor is there any reason; as the thing may be mortgaged twice or thrice over. Undoubtedly as the preamble makes no such distinction, so the enacting clause will in its descriptive words take in one as well as the other. The only question which can arise is, whether the mortgagor, and not the mortgagee, shall be construed the true owner and proprietor. The conditional vendee is so: and the contrary can be no other principle than that of confounding pawns and mortgages. There might be some doubt perhaps in the case of a pawn, and 3 Bul. 17. was cited. But how can that be doubted in the case of a mortgage? Which is an immediate sale, although by performing the condition the thing may be redeemed afterward by indulgence of a court of equity: but till performance the conditional vendee, though subject to be divested thereof, is the absolute proprietor. A pawn is complete by the delivery, but an absolute sale is complete by the contract, and the party is intitled as soon as the money is paid. If conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods: and therefore should come in the same case with other creditors, especially as he has been the bait to draw other creditors in. But there is an express case in point destroying every such distinction, *Stevens v. Sole* (1). It was argued, there were subsequent cases impeaching the strength of this: but none such have I seen. As to *Bourne v. Dodson*, December 4, 1740, it is sufficient to say there was no judicial determination; but the Lord Chancellor said, the assignment, if void, was void at law, and directed a trial; but then considered the great inconveniencies which might accrue, if ships and a cargo at sea should be liable to the bankruptcy of the party in the mean time; and on the other hand if mortgages and conditional sales should be construed out of the statute: so that it was not determined, but sent to law. And

gee, who has the title-deeds without notice of a prior incumbrance, shall be preferred. Negligence alone will not postpone the first; it must amount to fraud. See per Lord Eldon, Chancellor, in *Evans v. Bicknell*, 6 Ves. 183.

(1) Cited ante, 352. and 1 Atk. 157. 161. 170.

ther case for this was *Brown v. Heathcote* (3), *Mich.* 1746, where it was contended, there was no delivery of possession which remained in the bankrupt till the ship's return, so that it was within the statute of J. 1. but *Lord Chancellor* held not; the case not being within the description of the statute; for the assignor could not be said to have the order and disposition; there being no possibility of putting *Heathcote* in possession: nor could he consent or dissent as to the possession continuing, as it did, of a ship and cargo at sea. Nor does it come within the [362] reason of the statute; which was intended to hinder the acquiring false credit or substance; which could not be, where an ownership could not be shewn. And a delivery of all the muniments and means of reducing a ship or cargo at sea into possession is in law a delivery of them. So a delivery of the key of a warehouse is a delivery of those goods, which are bulky, being the only immediate delivery the things are capable of: so that this is not within the intent or words of the act, as *Stevens v. Sole* is. Then a conditional sale is the same as an absolute sale, where the possession is left in the bankrupt, in order to acquire a reputation of ownership, and so a false credit. It is necessary to apply this to these mortgages: though *Jonathan Stevens* will be preferred in point of mortgage upon the real estate, to *Tomkins*; yet as to any lien upon the utensils fixed, the mortgage of *Tomkins* will be preferred to *Jonathan Stevens*. The mortgage of *Tomkins* is of a double nature of a lease of the house, with the fixed and moveable goods. As to the fixed, there is no title to remove them, till the mortgagee is satisfied. for though they might be seized according to *Poole's case*, 1 *Salk.* 368, yet where a trader erects fixtures to his house, and leaves it; neither he nor any other can remove them during the term, any more than he can cut down trees, during the term he had leased, if they are part of the lease, and not excepted thereout: those, which are not fixed, will be liable to the seizure; in a lease of the house with the moveables, the whole rent issuing out of the house, and not out of the chattels. 5 *Co.* 17. 1 *And.* 4. *Dyer*, 212, b. It is true, that a partner is possessed *per my and per tout* of the chattels: and therefore no actual delivery is requisite: but the offence of the statute is not that, but the permitting to continue in possession after a sale to another; and that other is intitled to the possession of the whole in *entirety*, as *Jonathan Stevens* was intitled: who therefore permitting *William Harvest* to continue as half owner, is within the case described in the statute. Next consider the other three mortgages of a seventh share of the bankrupt's moiety in the partnership stock, utensils, debt, stock and profits in trade, partly things in possession, partly in action. But I will first consider the case of an assignment of a mere *chose in action*. The simplest case I know, is of a debt on bond; which is only assignable in equity, not at law: the reason why assignable in equity is, because the assignor can furnish the assignee with all the means to reduce it into possession, giving authority to sue in his name, and the bond in his hands to prove the debt, when he does sue. Why is not delivery then as requisite on such an assignment as a delivery in the conveyance of a thing in possession? Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself at law? A bond debt is certainly a

safe custody, are within this clause? The preamble, speaking of bankrupts only, is narrower than the enacting part, which spake of any goods: then as to the effect of it, I admit in many cases the preamble will not restrain the general purview, as in *1 Jones*, 163. *Pal.* 485. But it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience, it shall restrain: and and here would be an inconvenience, if not restrained, from the hazard to trade. In *L'Apostre v. L'Plastrier* the preamble governed. So in *Godfrey v. Fuzzo*, 1 *P. Wms.* 186. So in *ex parte Marsh* (1), *August*, 1744. I own in *Copeman v. Gallant*, Lord Cowper's reason for holding it not within the clause of the statute was, that the assignment was with an honest intent, for payment of the debts of the assignor, and he decreed for the plaintiff. I have a great reverence for his memory: but though I approve of his decree, I cannot agree to the reason; for though an honest intent will intitle to regard; yet if an honest intent is sufficient to take it out of this clause, both the letter and intent will be overturned. As to the objection on part of the defendant from the case of factors, the reason of it is not well founded; because it must relate either to persons acting by commission only, or in their own right and by commission; in neither of which is there any deceit, so that the reason fails: in the former there is no pretence, that the lender advances his money on the visible stock, it is on the general credit. Then consider, whether any of these goods in the Master's report are within this clause. As to the goods fixed, they are like trees, considered in law as part of it; but as they are capable of being severed (I do not mean by severance a cutting down) they are capable of being re-united. *Hob.* 168. *Stukely v. Buller*, and *Owen*, 49, [366] the things fixed to the brew-house had been several times mortgaged distinct from the brew-house, but were vested in *William Harvest* afterward, and no occasion to deliver to *Tomkins*: but they will pass by the mortgage of the brew-house with the things fixed.

I admit *Pool's* case in *Salk.* that during the term the goods may be sold: but the present is distinguishable, there being a mortgage; nor could he remove the fixtures, because of the mortgagee's interest: otherwise great inconvenience would follow; as lessor of a brew-house with his own fixtures would be liable to be stripped thereof. As to the utensils unfixed, where the goods mortgaged are of such nature as to be capable of delivery, there ought to be an actual delivery; but if no delivery can be at the time of the mortgage, it is sufficient, if the proper means of reducing into possession are given. If bulky goods in a warehouse are mortgaged, delivery of the key will be sufficient. I agree also with *Heathcote's* case; but there Lord Chancellor determined it not within *Stat.* 21 J. 1. chiefly because the ship and cargo could not be delivered but by delivery of invoices, &c. It is objected for defendant, that an undivided share of stock will not admit a separate property and possession, and therefore for necessity the possession of mortgagor must be possession for mortgagee: but though it is true that a partner has a joint interest, these interests are severable, as appears by a *fieri facias* against one partner, which will not affect the other's moiety; the consequence of a sale under that will be, that vendee of the sheriff will be tenant in common with the other part-

ner. 2 *Mod.* 279. 1 *Sho.* 173. *Sal.* and 2. *Raym.* 871. To consider the cases cited: in *Megot v. Mills*, this statute appears not by the report in Lord *Raym.* to be considered; though it might properly: the other statutes were only considered; which differs it from the present. Next *Cole v. Davis*, 1 *Raym.* 724. admits the same answer; and I doubt, whether the sale there was not accompanied with a trust, like *Twine's* case; so as to be avoided by 13 *Eliz.* but that was not within the clause of the statute *J. 1*; because the bankrupt there did not take on him the sole alteration as owner (which is required by the clause) but the sheriff. As to *Small v. Oudley*, a distinction was taken by Sir *Joseph Jekyl* between a man's own trade and another's: this clause was overlooked both by court and counsel. *Buckner v. Royston* is rather an authority against defendants than for them. In the present, all the requisites in 21 *J. 1.* concur to bring the case within it; as the possession of the goods was not delivered, though capable thereof; *William Harvest* having the possession; and the articles of partnership, an evidence of his title in his hands; and taking upon him the sole alteration as owner.

On the third question, it is objected for defendant, that this clause extends not to things in action, as are mortgages of parts of shares; speaking only of goods and chattels, which a person has at time [367] of bankruptcy in his possession: but goods and chattels include debts. *Stam.* 188. *A. Slade's* case, 4 *Co.* 95. and things in action are considered as goods and chattels in a person attainted; and so the crown intitled. *Lytt.* 80, *Clayton's* case: so 12 *Co.* 1. If then goods and chattels comprehend things in action, in the construction of any act of parliament, it ought in this; for otherwise he might assign without notice to others, and so have the order and disposition within the meaning of this clause; and this is enforced by the first clause, that the most beneficial construction for creditors under the commission should be made (1). But it is said, there can be only an equitable assignment of a *chose in action*; which is true; and yet in case of bonds assigned (for bills of exchange or promissory notes are assignable at law) they must be delivered; and such delivery of the bond, on notice of assignment, will be equivalent to the delivery of the goods; for the debtor cannot afterward justify payment to the assignor. *Domat, Lib.* 1. this clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee; for no notice appears to be given. The assignees therefore have power to dispose of it for the benefit of the creditors.

As to the fourth and most difficult question: it is objected for defendants, that though *Potter* did not take possession, he was merely nominal, and *Stevens* to be considered as a vendee of *Harvest's* moiety, and was a partner with him, and so continued, and in possession *per my and per tout* with him; and I agree he was at first: but when *Stevens* became intitled to the other moiety, the question is, whether he should not have had the sole, and not a joint possession only to take it out of this statute? As *Potter* did not interfere, *Stevens* should have taken possession, which not having done, *Harvest* continued in possession as visible partner; received the debts, &c. by consent and permission of *Stevens*; had the order and disposition, and was one of the reputed owners as much as *Stevens*. It is

(1) See *Jones v. Gibbons*, 9 *Ves.* 407. cited ante.

objected, that the law would judge *Stevens* to be in possession according to his right; but there is no colour for it, where he permitted all this inconsistent with his own right. A further difficulty arises from the several determinations in this court, that one partner borrowing or embezzling any partnership effects, his own share is liable; as held in *Melioruccky v. London Assurance Company* [*Eq. Ab.* 8.] The reason of those determinations relating to partnership is, that each is liable to the whole of the partnership debts; and if one is charged further than he ought, equity gives him a lien on the partnership effects; that is true, but not applicable to the present. Here *Harvest* did not borrow money or embezzle the effects of the partnership. This is not a partnership transaction; but as distinct as if strangers had done it. Nor is it applicable in point of reason; all the partnership debts being paid. There is no instance [368] where this rule of equity extends to private loans; all the cases relating to partnership transactions, and so should be confined.

I agree therefore, that none of the mortgages in the Master's report, except the mortgage to *Tomkins*, and those secured by buildings on land, are out of 21 J. 1.

Lee, Chief Justice. I concur entirely. These securities are to be considered as mortgages, not as hypothecations, &c. as has been properly observed by Justice *Burnet*: and this is a question, which must receive its determination from 21 J. 1. 13 *Eliz.* being only declaratory; and all the cases offered on that head have been already answered: I shall therefore confine myself to the *stat.* 21 J. 1. as the *ne plus ultra*; the line being drawn thereby which is to govern here; and there are three points thereon.

First, whether the mortgagee is not true owner and proprietor, to whom there should have been delivery of the goods mortgaged? In the general preamble of this *statute*, notice is taken of divers defects in former statutes in description of bankrupts, and in the power to commissioners to discover and distribute the bankrupt's estate; and therefore it enacts, that it should be taken most beneficially for that purpose. Every word of the statute must be considered both of the preamble and enacting clause. The present case is directly within the words of the preamble; the bankrupt himself having conveyed the goods to *John Stevens*; there is no occasion therefore to give any opinion in relation to that head, of restraining the enacting clause by the words of the preamble, which is not material to the present, it falling within the preamble. To remove the difficulty with respect to commissioners of bankrupt, having in their possession as reputed owners, and taking upon them the alteration as owners, (which differs it from the case of factors, who dispose not as owners, but for others) the commissioners may dispose of this, for benefit of the creditors. This statute then makes the reputed ownership as real for benefit of creditors in general; the persons own misbehaviour depriving them of the benefit of the conveyance though made for good consideration; and they shall not be in a better condition than other creditors. Consider then, first whether the mortgagee be the true owner and proprietor? There is a clause in 21 J. 1. relating to redemption of a mortgage by assignees, not only mortgage of lands, but goods on condition. In *Co. Lit.* the effect appears of a feoffment on condition; and the reason of the difference there,

is that the feoffor has only a bare condition, and no estate in the lands which he can assign over: but feoffee has; which is saying, that he is owner of the estate, as having the interest in it. The [369] true owner is in this act of parliament in opposition to reputed owner. As to the cases cited on this point to make a distinction between conditional and absolute sales; *Stone v. Grubham*, 2. Bul. 226, was determined entirely on the statute of Eliz. and common law: though the plan of the statute differs greatly from the plan of the statute of J. 1. this act supposing the conveyance to be on good consideration, and the party to be an honest creditor or mortgagee, but not have any preference to other creditors, because he does not give notice to other creditors by having that delivery to him, to which he was entitled; so that this is more like the cases on the register act, where the person loses the benefit of the conveyance by not giving notice, arising from his own plain neglect. The donee is not to suffer donor, who has made the conveyance, to continue in the possession there described; which direction in that act of parliament is as necessary to be followed, as in cases of the register act: and though *Stone v. Grubham* is not material to the present, (nor is there any thing from any part of that case inferring a difference between conditional and absolute sales) yet, what is said there, may infer, that mortgagee must be considered as true owner; for if mortgagor is tenant at will to mortgagee, as said in *Bulstrode*; who is owner of this estate? If the property is transferred to mortgagee, the mortgagor can have only a condition according to *Co. Lit.* 210: and the mortgagee has such interest as makes him owner or proprietor. The other cases cited for this, have been fully answered already.

The second question is, whether the debts and chattels should not be delivered, as far as they are capable? Upon which *Stevens v. Sole* is in point, on the foot of a mortgagee of a personal thing; and Lord Comper's observation in the case in *Chan. Pre.* is agreeable thereto; and which two cases determine that question on the specific goods; and it will be the same as to the shares of the partnership stock, which are partly in possession, partly in action; and as to all debts, &c. which are conveyable in equity. The inquiry on the second point is, whether *choses in action* are not included under goods and chattels? and I agree, some books countenance the contrary opinion, particularly *Swinb.* 407. 8 *Co. Caley's* case, is like that also. This opinion was grounded on the legal notion in respect of *choses in action*; that they are not grantable as *choses in possession*; but this is now out of question, *choses in action* will be included therein. *Fulwood's* case, 4 *Co.* 65, proves that a *chose in action* (as an obligation) is a chattel. So *Stamf. Prerog.* 65. c. 16, that chattels comprehend a right of action to goods: there is no word in the statute to give this right of action but the word *chattels*; and, if forfeited, they must be considered as chattels in the person forfeiting. The same interpretation has been made in other statutes: So *Ford's* case, 12 [370] *Co.* If then goods and chattels include *choses in action*, all the debts acquired to the partnership by sale of the joint stock, must be distributable as the goods themselves; for which *Burnet*, Justice, has cited several cases, that the produce of specific goods follow the nature of the goods themselves: so is *Swinb.* 414.

The last question relates to the mortgage of *Stevens*, the partner, whether he has had such a possession, as will exempt him from being

sidered as owner or proprietor, by whose consent the bankrupt has had in his possession the goods as owner, altered, &c. I mean goods severed; for the fixed are part of the freehold; and, when mortgaged, remain so, till the mortgage is satisfied? This mortgage to *Potter* in trust must be considered as a mortgage to *Stevens*; and though endeavoured to be distinguished from other mortgages, because he was a partner, and in possession, and wanted no delivery, the true answer has been given to that: though he held the possession, yet not such a possession as this *statute* requires, and consequently it is imputable to him, as owner, that he has let *Harvest* have possession in respect of that moiety; producing the same inconveniences by creating a false credit. As to *Stevens* having a lien on the stock for the money due to him, and his being distinguished from other creditors, no case has been cited for that. That distinction would have been material in *Croft v. Pike*, but not taken there; nor can it be here; for it was a transaction not concerning the stock of the partnership; they are as much disunited as any others; nor was this a debt created on joint stock: nor can he therefore have any lien on the joint stock: and though no judicial determination, yet I may cite a civil law authority, as *Dom. Lib. 1, fol. 155*, concerning partnership, thought not as authority on which a judgment is to be founded in our courts; yet, as said by Lord *Raymond*, may they be used as the opinions of learned men.

I am of opinion therefore, that the *statute* of *J. 1.* is the rule to be followed in the case; and the intent thereof was to prevent the bankrupt's acquiring false credit: that for the benefit of creditors in general, these goods shall be esteemed his, and distributable as his; so that they must come under the commission. Whether this is a wise provision, or no, in this statute, is not for the determination of the court; for while it continues a statute it must be followed.

LORD CHANCELLOR.

I am obliged to the Judges for their assistance and endeavours to give light to so intricate a case; which intricacy arises in respect of the want of a number of authorities as to the construction of this act of parliament, though made so long ago: but a greater intricacy occurs in respect of the conduct of *William Harvest* in making these securities. All the authorities, giving light to this, have been exhausted by the judges; and it would be mis-spending of time, to repeat what has been said. It is sufficient therefore to say, I concur in the opinion delivered; but as this is a case of great expectation and consequence, I will reduce the grounds to some general principle.

There arises two general questions. First, whether any mortgages or conditional disposition or conveyance of any goods and chattels are within the *statute* 21 *J. c.* 19. *sec.* 10 and 11, as it is by misprint described in the statute? Secondly, if any are, which are? A third has been made, by a distinction on the mortgage of *Harvest's* moiety in trust for *Stevens*, whether that be within this clause?

As to the first, I will not enter into a particular discussion and argument of two points made at the bar: the one, whether the enacting clause extends to all goods whatsoever in the custody of the bankrupt (whether his own originally or moving from others) or whether it is to be restrained by the preamble, and to extend only to goods originally the bankrupt's; which I will not argue? the other is, whether *choses in action* are within

this clause? Let the construction of the clause, as to this, be what it will, whether to be confined or not to goods originally the bankrupt's, this case as to this point is undoubtedly within the act, because it cannot be disputed, but that all the goods now in question were originally the bankrupt's; moved from him, conveyed and mortgaged by him. But I strongly incline to concur with the opinion of *Holt*, that this clause must be restrained by the preamble, as Lord Chief Baron seems to do, and differ from Lord *Cowper*; though the decree made by him, was undoubtedly right. *Choses in action* are properly within the description of goods and chattels within this clause; and I will only add one argument, for the sake of which I mention it, which is, that this construction is strongly warranted by the next proceeding clause relating to bankrupts, who by fraud make themselves accountants to the king to defeat their private creditors; which plainly shews, that the words *goods and chattels*, as used in this act, take in all kind of personal property of the bankrupt, whether in possession or action only; which strongly supports the construction made by the Judges, and is agreeable to 12 *Co.* where it is held, that in an act of parliament *goods and chattels* take in *choses in action*. The reason of the other opinion in the books arises from hence, that this question has arisen on a grant or assignment, or bargain and sale; not being such goods and chattels as would pass by that assignment or conveyance: but in an act of parliament, which can pass any thing, they are always included.

I go on four general principles in the construction of this [372] act. First, the aim and intent of the legislature was, that an equal proportion of the effects of the bankrupt among his creditors should be attained as far as possible. Secondly, that to attain that end these acts of parliament should be construed beneficially for the general creditors under the commission, and therefore it is in an unusual manner, different from most acts of parliament, enacted, that all these statutes and laws shall be largely and beneficially construed for the creditors in general under the commission. Thirdly, it appears, the general view and intent of the provision, now under consideration, was to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those, who should deal with them. Fourthly, the legislature judged, they might do this by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission (y); because where the vendee or assignee leave such goods in possession of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor, who has only taken his bond or note. It is in such case put in the power of the bankrupt to sell the goods next day; the former assignee could only have a personal remedy against the bankrupt. All these grounds go to the substance of the case, and not upon niceties; and hold in case of mortgage as well as an absolute sale: otherwise it would be contrary to the resolution of *Stevens v. Sole*, and the opinion of Lord *Cowper*, in *Buckner v. Royston*, and to his implied opinion in *Copeman v. Gallant*; and would overturn this part of the statute, and restrain it to absolute sales. Traders instead of absolute sales would then make such mortgages; and there would be great opportunity; for traders might mortgage over and over again, as this case is a pregnant

(y) *Secus* where the goods are not left in bankrupt's possession, as a lease pledged, was carried into effect against assignees of a bankrupt. 1 *Brown*, 269.

instance. As to the most material and operative expression, the legislature has explained their own sense, by putting the words *true owner* in opposition to *reputed*, not *special owner*; and then these last words can only mean a person, who by specious acts of possession, order and disposition, gives himself an appearance of property he has not really, (which is the present bankrupt's case) till the mortgage money is paid.

Then it follows, that the mortgages to *Reynel*, *Skip*, and *George Harvest*, and so much of the assignment to *Stevens* as relates to the utensils not fixed to the freehold, which are made a farther security to him, must be void within this clause, as far as they are claimed to be specific liens. The distinction endeavoured has been answered; and the distinction most laboured, that a share of a partner in a partnership stock is only a sort of proportion arising on the balance of the partnership account and incapable of being delivered, would let in that false, delusive credit (intended to be prevented) in all trades in partnership, and would extend to

[373] particular goods in partnership (z). As to *choses in action* comprised in these securities, where it is admitted none could pass in equity, equity ought to follow the law in this case, if in any. Where property is established by act of parliament, equity follows it, in like manner as where established by common law; for if not, it would cause great confusion; and it is always so taken on acts of parliament made concerning real and personal estate, regulating that kind of property, for which there is a strong instance in the statutes relating to papists; for, though subject to penal laws, equity regulates in the same way, by the same rule as the statutes lay down concerning legal property.

The third and last point is in the construction of *Potter's mortgage*; which is said to be directly as if made to *Stevens*; and, I think, upon the whole it would be so: though perhaps if it was nicely scrutinised, some difference might be taken; but whatever legal interest, that vested in *Potter*; and the law would not have taken notice of the trust, if the question was at law: and therefore if this act of parliament has made it void at law, this court would never set it up contrary to law for the sake of *Stevens*, because he was a partner, but would let the law take place for benefit of the general creditors. As to any of these goods in that mortgage, which equity only could pass, equity will follow the law; for as to the profits arising from trade and *choses in action*, there could not be an equity upon an equity; equity would vest them in *Stevens*; and it would undoubtedly be considered, as if the assignment had been directly to *Stevens*. And here the principal objection arises: it being said, it vested in *Stevens* as to these particulars, and that *Stevens* was partner then, and if he had not taken this mortgage, he would be intitled to have an allowance, out of what would be coming to *Harvest's* moiety, and would have a specific lien on that moiety; and therefore *Stevens*, taking a mortgage of the other share, would not be put in a worse condition than without it. This was the most plausible thing urged for the defendant; and would be right if the foundation was right; but I dispute their foundation; which must be, that the party so lending gains a special lien on the partner borrowing, and should be allowed a preference to his separate creditors: but for this there is no authority or precedent after a bankruptcy.

(z) 1 Brown. 125. 1 Atk. 171, 177.

It is a different consideration, what a court of equity might do between the parties themselves, while both remained capable of transacting for themselves. But I might carry it further; for it is so after death of a partner where his effects come to be distributed as assets (1). In the case of *Meliorucchy v. London Assurance Company*, the points determined are not material to the present; but there the attempt made was to subject stock after a bankruptcy to a debt contracted to the company by a loan of money, and arguments were drawn from rules concerning partnership: but it was not contended for, that in case of a partnership that could be carried further. And the case cited of *Croft v. Pike*, is as strong as any negative authority can be; for there it was not attempted [374] to give the surviving partner a right of retainer or bringing into the partnership account a bond debt, so as to be preferred to others, but only as executor; and therefore the money taken by a deceased partner out of the partnership stock, was allowed to be brought into the partnership account, but the bond debt was not, because a separate loan and transaction. If then by a new determination now it should be admitted, and that one partner by lending money to another in a separate capacity, not relative to the partnership, should gain a specific lien on the effects of the partner so borrowing, it would open a door to fraud, and so defeat this statute; for then a person might be taken in as a partner into a moiety of a great stock and flourishing trade, and he may have a separate credit on that confidence, and yet may not have any in reality of the property in that stock, but the whole may belong to others: which tends plainly to great fraud and imposition on traders, and great mischief. It has been said, that great mischief might arise to trade and credit from such a determination as this, as tending to prevent making use of that credit persons have to support themselves in trade, as they cannot make a security without exposing their circumstances to the world: and on the other hand it is contended, that the other construction would in fact repeal the act of parliament, and let in a mischief: some inconvenience might perhaps arise from a determination of this case on either side; but I agree with *Lee*, Chief Justice, that, as this is a law, we must adhere to it; and while it is a law be bound by it; and if any inconvenience results from it, that is for the consideration of the legislature. But this I will say, that as some inconvenience may be to particular persons on one hand, great inconvenience may be on the other, by creating that appearance, as having the substance of which they remain in possession, though they have not at all the real property: and that this was the intent of the legislature, I am clear: and I may go so far as to say, that the simplicity of those times did not let in these large and airy notions of credit as of late; which from the number of bankruptcies we have had of late years, is rather an evidence, that the departing from the rule this law has laid down, and giving way to these notions, has been rather a mischief.

I agree then, that these mortgages cannot prevail as specific liens and securities, therefore as to the mortgages of lands and fixtures, they are not affected by the act of parliament; but what is affected by the direction therein is the assignment to *Stevens* (for *Potter* must be considered as trustee for him) relating to any utensils not fixed to the freehold. So also

(1) See *West v. Shipp*, ante, 239, 242, &c.

are all the four mortgages of seventh part by reason of the bankruptcy of *William Harvest* made void by the statute, and can create no
 [375] specific lien on the bankrupt's share of specific stock, debts, and effects, but they must be considered only as general creditors.

RYALL v. ROWLES, Feb. 3, 1749-50.

Interest—Where setting-off debts allowed.

THE cause coming on for further directions, *Lord Chancellor* directed, that as to £1600 the balance of the debts due to the partnership at the time of the bankruptcy received by *Stevens* or *Rowles*, his executor, the executor should answer interest in the same manner as on the other sums, which are part of the partnership stock; for the debts are part of the stock; and therefore as much reason, that when the money was got in, he should be charged with the like value as in the stock in trade.

Another consideration was as to £2000 short of the £7000 which *Stevens* was to pay as a consideration for the moiety of the stock in trade, when he was to be let into the partnership.

(a) As to this, *Lord Chancellor* said, the demand for the plaintiffs arose on a very bad transaction on the part of *Stevens* by exorbitant and usurious interest taken by him; and therefore the plaintiffs had a right to have that sum allowed. But the question was, whether they should have it as a distinct independent demand and to carry interest, or to be set off against the sum reported due to *Stevens* as a debt due to him, though not as a mortgage.

The executor insisted on a set-off, because by the act of parliament, where there are mutual debts one is to be set against the other; and that a creditor of the bankrupt on one hand, and debtor on the other, is not to be obliged to pay his whole debt to the assignees, and left to come under the commission.

Plaintiffs insisted, this was not a case within that rule; because no mutual credit was given; not being a debt arising from *Stevens* to the bankrupt by contract: but the demand, which the bankrupt and his assignees in his place, had, arose from fraud, and therefore not a mutual credit.

LORD CHANCELLOR.

The defendants insist on a reasonable rule. The bankrupt and his assignees were certainly intitled to have the benefit of this £2000 with interest from the time it ought to be paid. But as to the general question, whether this case is within the act for mutual credit, I am of opinion, it is; and that there is no distinction taken on what consideration it is, that debt, sought to be set off, has arisen. (b) There are several
 [376] cases, where demands have been set off against one another, that could not have been brought into the general account, if there had not been a bankruptcy: but wherever the court has found a demand on one side or the other, the court has always endeavoured, that one

(a) Vide stat. 5 Geo. 2 cap. 30.

(b) 1 P. Wms. 325. 1 Atk. 228. 126.

should be set against the other; which is founded on the act, "That where there are mutual debts, &c." This is a debt due from *Stevens* to *Harvest*; a debt in equity, though possibly no remedy at law, because the law admits not the party to an usurious contract to have a remedy; not allowing an *Indebitatus Assumpsit* for money had and received, though perhaps it may allow a prosecution on the act. But this court goes not on that rule, but takes it to be a fraud and imposition on a party in necessitous circumstances.

PYKE v. PYKE, Jan. 15, 1749-50.

(Reg. Lib. 1749. B. fol. 177.)

Covenant by husband before marriage to settle lands (1) in jointure for wife, and other part for the issue of the marriage, her fortune to remain in trustees till such settlement made. The husband dying insolvent without performing it, the wife's fortune survives for her own benefit, and the issue not entitled to take it from her.

PREVIOUS to the marriage of *J. Pyke*, articles were entered into by which he agreed to settle an estate in *Ireland*, first to his intended wife, who was now admitted to have been then under age, as a jointure; and afterward part thereof for securing the portions of younger children, and then the whole upon the first and every other son in tail: then that the wife's portion should remain in the hands of the trustees, till the conveyance or settlement thereby intended to be executed. But it was agreed, that it was the intent, that to enable *J. Pyke* to execute the said conveyance and settlement, the wife's portion should be applied to the discharge of the incumbrance affecting the estate; and the overplus to be paid to *J. Pyke*, his executors and administrators. The marriage was had: but no settlement ever made. There was a separation by agreement, upon recital of the bad circumstances of the husband, who went abroad and died.

This bill was brought by the wife for the payment of this part of the residue of her father's personal estate, which was in the hands of the executor of her father, as the right thereto survived to her upon her husband's death.

No estate in *Ireland* appeared, and it was admitted on all sides, that no settlement could now be made; but the defendants, children of the marriage, insisted notwithstanding on being purchasers under these articles, as an agreement for the disposal of her estate, which was binding, and that they were equally intitled with the mother to have the benefit of it, although no settlement made: that the court should decree an equi-

(1) The covenant was to settle "lands in *Ireland*, of the clear yearly value of £400 sterling, as money was valued in that kingdom, in such manner, that immediately from and after the decease of her said husband, the plaintiff should enjoy the same for her life, as her jointure." It is stated in Reg. Lib. as from the bill, that the husband *had* an estate in *Ireland*, but that it was so loaded with incumbrances that the plaintiff's fortune was not nearly sufficient to pay off such as were prior to the articles: for which reasons the executors of the plaintiff's father did not think it advisable to apply the plaintiff's fortune in discharge of them.

valent to them: or that an equitable proportion should be found out; this being a losing bargain, and both purchasers.

[377] LORD CHANCELLOR.

The question is, what is the right of the parties upon the circumstances? It admitted on all hands, that this portion of the mother is by the survivorship vested in herself, if nothing appears, to take it from her; and she has undoubtedly a right to sue here, or for aught appears, in the *Ecclesiastical* court for this. But what is insisted on to bar her of this, and to shew there has been a disposition binding this money, is, the act upon her marriage with her late husband. And it is certain, that in many cases an agreement on the marriage of a woman for the disposal of her estate will bind, as it is insisted for the defendants; but that is in cases where the agreement is fair and reasonable, and is done so as to prevent the husband from becoming intitled to be master of that personal estate, which by the marriage would vest in him. But if there is any fraud in the agreement it will not bind the property of the wife; but there is no necessity to enter into that; and it is the same, as if the wife at the time of entering into the article was of age. I question whether there is any such estate as in the articles. It seems to be only moonshine, there being no proof thereof. But however that be, it must be taken, that no settlement can be made according to these articles. I am of opinion, that the children under the circumstances are not intitled: and no court of justice can take this portion out of the hands of the mother or her trustees, who are the representatives of her father, unless she has that part of the settlement agreed for her benefit made good to her. There have been cases, where a marriage agreement entered into, and part of the provision made for the issue of the marriage has been to arise from different parties; as from the father of the wife, and from the husband, or father of the husband; and either the wife, or issue of the marriage, all purchasers under that, have brought a bill against the husband, &c. for performance, who has insisted, he ought not to perform, because the articles should be performed entire, and that the father of the wife has not performed his part: the court has still decreed, that the articles should be performed as against the husband, or his representatives, and he should take his chance to get a performance on the other side; it not being reasonable that they should lose the whole on one side because they would lose part, or the whole on the other. But that was a case, where the husband or the representatives of the husband were not to receive any benefit from the other side, or to take any advantage for themselves. And to carry this further, was cited for the defendants *Perkins v. Lady Thornton* (1); in which Sir William Thornton in consideration of £1000 was to settle a jointure on his wife: that she was no party to the articles, but it was contracted between them that she should have that jointure; that

[378] the money was not paid: Lady Thornton married Perkins, and brought a bill to have the jointure, and that the court decreed it.

Most of these cases depend on a great many circumstances: all of which I do not remember; but are different from this case. Lady Thornton there

was not a party, she performing only; and was only to perform by marrying, and therefore was entitled to her jointure, on the faith of which provision she had married. But if the wife had contracted in that case to pay the portion, the court would not have decreed her to have that settlement if she did not pay that portion. But where the wife has contracted before marriage, in consideration of the marriage, and a portion to come from herself; where the articles remain unexecuted, and the husband has died, and the right to the portion has survived to the wife, and the children brought a bill against her, there is no case where the court has ever taken that portion from her, unless they could put it in such a shape, that she should have the benefit of her articles; for then the court would certainly do it, which otherwise it would be strange to do, when marriage-agreements are to be performed entire. And it would be strange, the legal right to the portion in the hands of the wife should be taken from her, and she not to have the benefit of the other side. It arises from the fraud and misbehaviour of the father to the children. The mother has as good an equity as themselves, and has the law of the land on her side; having a right to sue in the *ecclesiastical* court, which is the law of the land in this case. Then they are purchasers in equal degree, and the children have not a right to come against the mother to make good that failure on the part of the father. But supposing the court can do it in any case; whether in this case: it being here desired of the court to decree an equivalent, and on the foot of that equivalent to take from the mother that legal property which she has. The argument is only, that the wife's fortune should remain in trustees till a settlement was made in pursuance; which settlement is of the husband's estate, and her portion is to pay off the incumbrances thereon: but no such estate appears. If there should be a specific performance, that estate must be found out: but an equivalent is desired; that is not a specific performance; but finding an equivalent for the children, in order to strip the mother. But if I was to do this, and substitute this equivalent in the place of the articles, it would be in such a case as could not tend to the benefit of one shilling for the defendants. The equity would be then to lay out this money in land, and the arrears of this jointure, &c. must fall on the inheritance of this estate to be purchased, before the issue of the marriage can have the benefit of it, and would eat up the whole.

The jointure must first be paid, and so far the case of Lord and [379] Lady *Mohun* goes; where the opinion was that whatever become of the issue of the marriage, the wife was intitled to have that made good to her, and then it would be no benefit to the children to make such a decree. As to the equitable proportion insisted upon, it is difficult to set up that voluntary jurisdiction in this court. But if done, it has been where a settlement has been actually made, which is deficient. And if such a settlement had been actually made, and the husband got the portion, and spent and dissipated it, the court might do it; because it would be the best thing to do. But there is no instance where one right is entire, as the mother's portion is here, and in her own hands, that the court would take it from her, unless she has what was stipulated for. The legal right therefore, which the mother has gained by surviving her husband ought to prevail; and it being admitted that no settlement can be now made, pursuant to the intent of the articles; and it appearing that

the growing payments and arrears of the plaintiff's jointure exceed the value of the capital of her share of the residue of her father's personal estate, it must be transferred to the plaintiff.

CRAY v. MANSFIELD, Feb. 7, 1749-50,

(Reg. Lib. 1749. A. fol. 658.)

Sir JOHN STRANGE, *Master of the Rolls, in the absence of LORD CHANCELLOR.*

Voluntary conveyance, by one lately come of age (1), to an agent, of a reversion of no great value, for nominal consideration of £180 (2), and containing covenants as in the case of a purchase, not absolutely rescinded (3), as not being a case of fraud; but the transaction modified by decree, that the agent should release the covenant at his own expense, and recited the impropriety of them as referable to a gift.

THE defendant has been steward or agent to the plaintiff's father's estate, and kept his court during his life; and after his death was appointed receiver of the infant's estate under the order of this court; for which he had a salary during the minority. This bill was to set aside a conveyance, which the plaintiff admitted he executed to the defendant after coming of age; and which as framed and executed, was a conveyance from the plaintiff of the reversion of some leasehold estate that were out on lives, for the (2) consideration of one hundred and eighty pounds.

The case stated by the plaintiff for this was, that the defendant applied to him to add the life of the defendant's son to one of the tenements: which he promised to do, directing the defendant to prepare a deed for that purpose, which was all he proposed to have given him; frequently declaring that he would take no consideration for it; saying he was ten times more obliged to the defendant, than the value of that: that the defendant brought to his lodging this deed ready engrossed, and offered it for execution; that he was imposed on therein; being a hasty transaction, brought in a clandestine manner, and executed without the plaintiffs being apprised of the contents: that the defendant carved for himself by inserting that consideration of £180 when no estimate had been made, *Clarkson v. Hanway*, 2 P. Wms. 205, is applicable. So *Pierce v. Waring* [380] (4), where Mr. Waring was guardian of Mr. Hall, who lived with him; had horses, dogs, &c. kept by him: and whose visitors, were all entertained at Waring's own house, when Hall stood candidate for Ludlow. After coming of age, Hall made Waring a gift of £3000 East India stock, for his many kindnesses and services. Hall was satisfied with the gift, and did not dispute it: but his representative after his death brought a bill to set it aside. There was no proof of imposition: the only circumstance was by conjecture, as if Hall did not know the stock was worth more. The Lord Chancellor, November 13, 1745, set it aside upon the general principle: not upon the not knowing

(1) See 2 Vol. 547. and 9. Ves. 292.

(2) "For the nominal consideration of, &c." R. L.

(3) See 2 Vol. 259.

(4) See 2 Vol. 548. Et vide *Oldham v. Head*, ibid. 259.

that it was worth more; but that it was a consideration for which he would be allowed nothing in this court: that it was a dangerous example; and he would not endure a gift to be obtained on these circumstances after the coming of age. Beside, here the defendant is an attorney, and no gift during the transaction to a man in business will be allowed. In *Booth v. Walmsley* (1), a bond for £1000 was obtained from *Japhet Crook*, to his attorney: on a bill by his representative to set it aside, *Lord Chancellor* at first dismissed the bill, it being a voluntary gift, as a bounty, with his eyes open and knowing what he did. There was afterward a doubt on the general principle, and a petition to rehear; and on more mature deliberation his Lordship held, that it being a bond to an attorney, pending the suit, it was of dangerous example, and like the cases of marriage-brochage bonds, and set it aside absolutely. So did *Lord Talbot* in *Crook v. Hays*: as to *Langley v. Brown*, it depended on a variety of circumstances: there an old man courting a lady desired it should be put off, being under a bad habit of body. Her fortune was £1000, and a settlement was made on her in the shape of a marriage-settlement; and the reversion in fee to her whether the marriage took effect or not. His Lordship asked whether the deed could possibly stand for more than £1000, but, after consideration he went on this; that it was his plain intent to make this settlement on her, in regard to his intention to marry her: therefore there was no ground to set it aside: he intending it should stand whether he married her or not: although it could not be a marriage-settlement, because no marriage ensued. It went afterward to the *House of Lords* on the same evidence and reasons, and was affirmed.

For Defendant. If the court was to suffer a guardian to take such an advantage of his pupil as in *Pierce v. Waring*, it would destroy the confidence; it was there got from him just on his coming of age, and the stock was a great deal more than £3000. As to *Japhet Crook*, he was at the very time under a prosecution for forgery, and no one would appear for him; so that he was absolutely dependent upon his attorney, who undertook that very cause for him. In the case of *Hays*, [381] it was a sum given to carry on that very cause: yet the court did not set it aside as a security. The foundation upon which the defendant builds this deed, is not any particular ground or reason he had to make this demand on the plaintiff; only desiring to become a purchaser of it at a reasonable price: although this is a very imprudent and improper deed under the circumstances of its being accepted by the defendant as a bounty to be executed at that time: yet the defendant was not quite sure whether the plaintiff would not repent of his generosity in saying he would give it; and therefore prepared the deed on the foot of a purchase. The defendant had done the plaintiff services during his minority, and this reversion upon so many lives, is not a matter of great value.

MASTER OF THE ROLLS.

No doubt but that if on the evidence, the court was satisfied there was this imposition upon the plaintiff, the power of the court would be very properly exercised in setting aside such a deed: but the court will rather

(1) 2 Atk. 25. 27. and Barn. Ch. Rep. 475.

presume that things were transacted fairly, unless the contrary appears; and there is no evidence of this particular imposition upon the plaintiff, which is made the stress and foundation of the bill: no evidence of the application for the adding the life of the son only in one tenement; nor any misrepresentation to the plaintiff of the circumstances or value of it at the time of the transaction. It is plain from the whole, that the plaintiff knew something more was contained in the deed: and there is a circumstance in the manner of the execution, of no very great weight indeed, but which I will take notice of to shew no surprise on the plaintiff was intended; that is, its being sealed with plaintiff's seal, and not brought ready sealed to his house: there is no ground therefore to set it aside upon the particular fraud charged. But there is another proper head of equity for the consideration of this court, which will always hold a very strict hand over all deeds, purchases and conveyances obtained from young gentlemen soon after coming of age by persons presuming too much on the confidence reposed in them, and drawing them in to execute deeds. If the defendant's had not been a reasonable satisfaction for his trouble upon application to the court it would have been increased; but he contented himself so till the plaintiff came of age. No evidence of any draft laid before the plaintiff, or that his friends were acquainted with it; the deed seems to have been brought to the plaintiff with one hundred and a blank, which was afterward filled up with eighty, and which appears to have been added with different ink, and a different hand; which per-

[382] haps was occasioned by the uncertainty of the value of the reversion.

Although no fraud, and the plaintiff not imposed on by having a deed put into his hands of which he was not apprised; yet it was certainly very imprudent and dangerous to be suffered, that the person who is to take the benefit of this grant, and who had that relation to the plaintiff should not out of a reasonable caution have advised the plaintiff to have lain this deed before some common friend or third person. The deed appears improper for the plaintiff to have executed, supposing he had knowledge of the contents; and it would have been better for the defendant to have stayed his hand, and ingrossed another according to the real truth of the transaction; and then the plaintiff had not executed a deed containing very improper covenants on his part, and a falsity on the material part, that it was a sale for valuable consideration. That there was, or was designed to be, any money paid, is now given up by the defendant himself, who disclaims its being a purchase by him: and he had warning enough to have framed it another way, by the plaintiff's declarations that it should be a gift. If then he has acted incautiously, who can he blame? In *Clerkson v. Hanway*, great stress was laid on what appeared to the court on the face of the deed; though indeed there was another circumstance, not applicable to this, which would have set that aside. But to go farther, though the deed had not contained that falsity, but was framed as a bounty, considering the light in which he stands (which will always weigh with this court) concerned for the plaintiff in his affairs to the time, for fear of such a precedent I should have inclined to have interposed. But before I give my final opinion; if ever there was an instance of a voluntary deed, appearing in every part not at all to tally with the design and nature of the grant, nor importing the truth of the transaction, but

where one intended a bounty, the other imprudently frames it so, as against all succeeding to the estate it might appear a sale and grant for valuable consideration. I desire to know if such a deed was established; for if so, I should incline to establish it, because I acquit the defendant of the fraud charged. I lay no weight on the services during minority: which ought not to be taken into consideration. The smallness of the value is, I own, a circumstance inducing me to think there was not a design fallaciously to draw in the plaintiff to execute a deed conveying these estates; for had the defendant meant such a fraud, he would rather have taken something in present of greater value to him, than such a remote reversion. But however the *major* or *minus* is of no consideration where it was so executed; unless therefore some such instance is shewn, I incline that the deed should not stand, but be delivered up to be cancelled.

For defendant. There is no case to that purpose; for that [383] must be where the bill is by a person claiming under the deed to have the benefit thereof. It is a known distinction between a bill to set aside a legal right, and a bill to carry a deed into execution: in which latter case, the court expects it should be fair in every respect: in the other, if not *in toto*, will let it stand so far as it is fair.

MASTER OF THE ROLLS.

I only fear the example, and will consider further; and if I could find the court ever refused to interpose or set aside a deed under such circumstances, I should be glad of it.

His Honour afterward delivered his opinion in the same term.

This deed, not being as claimed by the defendant, is not, with regard to the manner in which it is executed by the plaintiff, proper to stand out in that light against him. But if the court can relieve this case from that difficulty, it would be hard to set it aside merely from the circumstances of drawing the deed. The method occurring to me to prevent this from remaining such a title out against the plaintiff, is to dismiss the bill, so far as it seeks entirely to set aside the deed, and to have it delivered up: but that the defendant should execute to the plaintiff a special release, reciting the whole of this deed, that no consideration was advanced, but merely voluntary: and then to decree that the defendant should execute to the plaintiff a release of all the covenants contained in the deed, (which covenants were proper to be made from vender to vendee, but very improper in a grant of bounty) which is taking a middle way between setting it aside, and letting it exist totally. I do this merely because I am not satisfied that the bare manner of executing this design of the plaintiff, if the court can deliver it from that circumstance, is a sufficient foundation totally to rescind it.

This to be at the expence of the defendant; but no costs on either side.

TRAVERS v. BULKELEY, February 8, 1749-50.

LORD CHANCELLOR, and Sir JOHN STRANGE, Master of the Rolls.

S. C. 1 Dick. 138.—Husband being abroad, a wife having appeared, and obtained an order to answer separately, whereby she freed herself from process of contempt, will not be allowed to have her own acts set aside.

Appearance saves error in mesne process only.

Appearance by wife without husband may be good.

MR. CANTILLON having died in 1734, a will of his was found in the *East Indies*, in 1736, and brought to *England*. The executors renouncing, administration with the will annexed was granted to the testator's widow and her second husband, during the minority of the testator's daughter. A bill was brought by the executors of Lord Powis against the husband and wife as joint-administrators; which administration determined since the filing the bill upon the daughter's coming of age. The defendants living in *France*, they were served the 26th of *October* last with a *subpœna*. The wife coming to *England*, was taken up on process of contempt issued against both: gave a bail bond for her appearance; and appeared for herself only; afterward she applied for time to answer separately, and obtained an order for that purpose.

It was moved, that the bail bond given by her to obtain her liberty on being arrested for want of appearance, and also her appearance might be discharged: which being adjourned for consideration, and to have precedents looked into, the motion was now made again, upon two points: First, whether the taking her up on the attachment was regular? Secondly, if not, whether the irregularity was waved by her appearance?

First, it was insisted upon as irregular; for that the husband and wife being one person, she cannot appear for herself; upon which principle the cases go; for where this court compels a woman to appear, and put in a separate answer, it is because the husband is only for conformity joined; the demand being against her in respect of her separate estate, and the husband is not affected in consequence of the decree: *Dubois v. Holt*, 2 *Vern.* 613, and *Bell v. Hide*, *Chan. Prec.* 328. this court, though courts of law do not, considering her in such case as acting in a separate capacity, as to the making grants, &c. of her separate property. And the reason of the thing warrants this distinction; for in those cases there is some fruit from the decree: here is none; for her answer cannot be evidence against any other, nor will it conclude herself, she having no interest in this but what her husband has; administration being granted to both; nor will it bind any thing in the account, nor bind the husband: nor are they proper to be made defendants in this suit, it being a limited administration, and the absolute administrator is the person to call them to account; otherwise they might account to every creditor: though upon particular circumstances of collusion, it might be brought against them, as against any other debtor. Secondly, though there is a general rule that the irregularity is waved, the objection not being made in time, (and it is so in criminal proceedings) yet is there a clear distinction. In courts of law a general appearance waves any objection to the form of the writ, because an advantage might have been taken of it, as abatement is waved by plead-

ing in chief. So if the objection is in point of process; so in the Admiralty and Ecclesiastical courts, there is an opportunity to object to appearing. But in this court appearance is first necessary before [385] any complaint of the irregularity of service can be made; for by the forms of this court there can be no appearance by protest, as in the civil law courts, but it must be generally. A defendant having been taken up on an attachment issuing on *Sunday*, appeared, and moved to have the process set aside on that account; to which it was objected, there was no irregularity, the *Rolls* formerly sitting upon *Sunday*: but supposing there was, that the appearance cured it. Sir *Joseph Jekyl* held it irregular, and notwithstanding appearance, the defendant might apply to set aside the process, and did set it aside. In *Burton v. Malone* (1), *March* 19, 1740, the defendant, against whom a decree was obtained and bill taken *pro confesso*, upon the late act of parliament of going beyond sea to avoid process, had been several years out of the kingdom before the decree obtained; which was known to *Hacket*, the attorney concerned in procuring the decree: there was an appearance, and an application afterward to set it aside; to which it was objected that the voluntary appearance waved any error in the process, and therefore whatever was the fate of the decree, the appearance must stand: Lord Chancellor held there, that appearance waved errors in several things, as in criminal cases, but was of opinion, that if a person was unduly compelled to appear by wrong practice, the court might discharge such appearance; and if that practice was with the knowledge of the party, would censure him, and ordered *Hacket* to be committed; so in the present case, where the defendant's wife has been under this compulsion to appear and give the bail bond.

LORD CHANCELLOR.

The order for commitment in that case depended on the ill practice. The question now is, whether it is consistent with law and the course of this court, after she has appeared and prayed time to answer separately, and had an order for it, to discharge her from these acts of her own? and I think not. The court takes all methods, and extends its process to assist parties coming at their relief, notwithstanding such residence beyond sea: and it is more necessary to do this here, than in courts of law where actions are more simple. Here it must be against a great number of parties; and therefore the court admits a suggestion in the bill, that a person who is a material party is resident beyond sea, and cannot be compelled to appear; and to proceed on that allegation, provided proved in the cause: which courts of law have no notion of. It appears also from two cases cited, that it is reasonable for the court to extend its jurisdiction as far as possible, that proper decrees might be made. It is true that in *Dubois v. Hole* on the face of the bill there was some separate property in the wife: but I do not understand it as stated in 2 *Vern.* (2). I do not remember that case has been mentioned to have gone [386] upon that reason of Lord *Cowper*; but always put on this, that the wife had appeared, and therefore Lord *Cowper* would not relieve her against that. Indeed there does not appear here any separate interest of

(1) Barn. Ch. Rep. 401.

(2) But see Mr. Raithby's note on it.

the wife; but she has appeared, and obtained leave to put in a separate answer absolute and unconditional: the effect of which appearance is said not to be the same as at common law: but this is the first time I ever heard of such distinction. Appearance saves no error in the original writ, but error in mesne process only. A party may appear voluntarily on a bill in this court; so he may at law upon an original writ, without any process. And as to that case, cited without a name, before Sir *Joseph Jekyl*, there must be something more in it; for as stated, if it was nothing but that the teste was on *Sunday*, I should be of a different opinion; because by appearing the objection was put out of the case. - I never before heard of the doctrine, that after appearance the party might complain of the irregularity of the service in a *subpana*; for if the label only be left with a servant of the family, after appearance the court will not set it aside, the irregularity being waved. But this is stronger, being the same as after imparlances at common law: and it is an admission on her part, that there is something separate from her husband, to which the wife is to answer. But it is said, the appearance of the wife is absolutely void in point of law, and therefore every thing built on it falls to the ground, because the wife can in no case appear without the husband; which I deny, both in the proceedings in this court and at law; for there are several cases at law where appearance by a wife without the husband is good: as in *Tot. 157. Westdean* — which shews that this court exercises stricter jurisdiction over married women, than courts of law. And *Dyer, 210*, in the marginal notes (which are well known to be of Chief Justice *Treby's* writing) shews that the appearance of a *feme covert* is not in every case void, even at law: so in *Sti. 475. Lee v. Lord Baltimore*, which case was undoubtedly going a great way. But a more modern case is in *Salk. 114, Carpenter v. Faustin*; where *Holt* says common bail should have been filed for the wife; which shews that appearance by a wife at law is not void: for common bail in *B. R.* is common appearance, which proves the wife may appear, and may be compelled in many cases. It is true the proceedings cannot be carried on till the husband appears, or something is done to supply it, as by continuances: so here it will be another consideration when the cause comes to proceed, what the court can do unless the husband appears; but that does not extend to discharge her appearance, and that order made: and when courts of common law go so far, it is a further reason why I should not be too strict in the course of this court. But the point of this case is on her appearance and the order made.

[387] *The Master of the Rolls* being present concurred in opinion that the defendant was precluded from taking this objection now. If any act shewing an acquiescence and defence of the cause, the court always says it is too late to set it aside, here is not only appearance but an application for time, and that case in *Salk.* is a very strong authority in the present case.

WHITFIELD v. FAUSSET, Feb. 10, 1749-50.

(Reg. Lib. 1749. B. fol. 541.)

Purchaser of an equitable title to a rent-charge, claiming against some purchasers of the land for a valuable consideration without notice, must try his title at law, in the name of his vendor. What amounts to notice. Draft of a deed, traced into possession of defendant's family, very good evidence. Where a party may come into equity on the loss of a deed. New practice at law of dispensing with *profert* (1). Bill retained for twelve months, with liberty to bring an action, &c. but afterwards dismissed voluntarily without a trial. As to dispensing with *profert* of a bond at law. Evidence as to loss of a deed.

As to a fine of land not barring a rent-charge issuing out of the land (2).

Where defendant's answer in another cause may be read.

A deed lost may be proved by circumstances, first shewing that it once existed, and next that it is lost or cannot be come at.

Fine cannot bar a possibility.

A rent charge barred by fine of the land out of which it issues (3).

Chase in action, or possibility assignable in equity. And no particular form requisite. Ante, 332. 2 Vol. 6.

Purchaser of an equitable title to rent-charge must try it at law against the owner of the land claiming in contradiction thereto.

Where on the loss of a deed you may come into equity (4).

Where *profert in cur.* is necessary, and where it may be excused (5).

Profert not necessary in pleading a gift under the statutes of uses. So where the plaintiff not intitled to the deed.

This cause came before the court on a bill to have an account of the arrears and a decree for the growing payments of a rent-charge of £20 *per ann.* as a purchase by the plaintiff for valuable consideration: setting forth the rent as created by a marriage-settlement by lease and release limited to uses, and dated 1692, to the use and intent that the heirs of the body of the wife and their heirs might receive this rent payable quarterly, with clause of distress; and the land was thereby limited, subject to that rent-charge, to the husband and his heirs: that in the life of the father and mother (after whose death their two sons were intitled to the rent-charge in *Gavelkind*, it following the nature of the land) the plaintiff took a conveyance by way of purchase from the two sons by deed without fine: farther stating that the deed creating the rent-charge was either in the hands of the defendant, or concealed by some of them, or lost; and therefore praying a discovery of the deed, that if they have it, they may produce it, or else a decree as above against the tertendants: insisting that though the sons had nothing in them which they could convey in point of law, as an heir apparent cannot in the life of his father, yet a court of equity will support such a conveyance by way of assignment or agreement; as in *Thebald v. Defay*, and *Beckley v. Newland*, 2. *Wil.* 182.

There were two sets of defendants material to be considered: *William* and *John Caffinch* the two sons from whom the plaintiff derived the purchase, and who admitted it: and three *Faussets*, viz. the father, his wife and son; who the plaintiff insisted must be presumed to have notice from

(1) Vide ante, 345. post. 505.

(2) Vide contra to Lord *Hardwicke's* position, post. 391. in 1 *Cruise on Fines*, 249. 251. 252. *ibid.* 248.

(3) Lord *Manfield*, C. J. controverted this doctrine, and said it was totally mistaken.

(4) See before. 345 Post. 505.

(5) Vide ante, 345, which refers (*inter alia*) to 6 *Ves.* 812, 813, 7 *Vas.* 20, &c. 9 *Ves.* 466, &c. *Quod vide* end note.

the deeds being in the hands of their family. The father's title was as purchaser of this estate by his mother for valuable consideration and without notice: that his mother afterward conveyed this estate to him voluntarily; that he on his marriage settled it on himself for life, then to his wife for her jointure, and to the sons of the marriage; under which settlement the wife and son insisted on being purchasers for valuable consideration without notice, and therefore not to be hurt in a court of equity.

[388] To deduce this title, the father said, that in 1705, there was a mortgage made by deed and fine for 500 years; which fine had the effect to bar and extinguish this rent-charge: that afterward an assignment was made of this mortgage, and in 1716 a conveyance for valuable consideration to his mother; and the mortgage-term was assigned to him to attend the inheritance free from any equity of redemption. So that either the fine had extinguished it; or else they ought not to be hurt in a court of equity, apprehending they had purchased the whole interest in the estate: that they were not bound by the admission in the answer of the *Caffinches*; and that it was an odd purchase from the sons, when they had no right or title to the rent, as the heirs of the body in the life of their father and mother, who both lived to be very old: and that a possibility cannot be given appears from *Hob. 45, 2 Vern. 563, 2 Bul. 223, Roberts v. Roberts*. But supposing it a good grant of an annuity, yet this court ought to send the plaintiff to law, and not relieve him here; for at law the plaintiff may declare on the deed, and afterward give parol evidence of the loss, in order to excuse the making *proferat* of it. As appears from a case now depending for judgment in *C. B. of the King v. Hays*; in which a grant is actually set out though lost; which shews it to be looked on as the constant practice of that court to state in the pleading that the deed is lost, and to recover.

The answer of the defendant *Fausset* in another cause was offered as evidence, wherein he admitted there was such a settlement made, but as to the uses he referred to such proof as the plaintiff in that cause should make.

The reading whereof was objected to; for that being an answer in another cause (c), not now at hearing, it was read only as collateral evidence, not as a judicial confession, as the answer in this cause would be, and that to let in any kind of collateral evidence there should be some proof of the deed.

LORD CHANCELLOR.

I was in some doubt; for there ought to be some proof that the deed was lost; some such foundation laid first: but ordered to be read, yet subject to be conclusive or not.

The plaintiff having ordered a search to be made had found a draft of the deed, but not the deed itself; the reading of which was next objected to, because there was not sufficient evidence that the deed was lost.

[389] LORD CHANCELLOR.

The rule is that the best evidence must be used that can be had,

(c) On an issue directed out of this court, defendant's answer directed to be read to the jury. 2 Vol. 42.

first the original; if that cannot be had, you may be let in to prove it any way, and by any circumstances the nature of the case will admit. This extends not only to deeds but to records; so far I mean as they may be given in evidence to a jury; for in point of *profert*, it is another thing. But for this the law requires a proper foundation to be laid; and two things are necessary. First, to prove that such a deed once existed: and there is sufficient evidence that such a deed, to a certain intent, did once exist, by the answer that has been read; which I do not rely on as evidence of all the uses of the deed, but as an admission that such a deed and uses, something of that nature, once existed. The next step is to shew some ground that the deed is lost; or, being in his adversary's hands, cannot be come at. What I go upon is, that there is sufficient evidence to trace this into the hands of the defendant, who is the purchaser of the estate, and has himself produced the lease for a year, which naturally accompanies the release, and makes part of the same conveyance. The parties to a lease for year are only those by whom, and to whom the estate is granted; not those who take by way of particular use. This then is a strong foundation to let the plaintiff in to read this draft, which is strongly proved: and there is a case in 1 *Mod.* where the copy of a deed not attested was suffered to be read, upon proof of a loss by fire, but without further proof.

Upon reading it, the limitation was to the use of the father and his assigns during his life, without impeachment of waste; and from and immediately after his decease, if his intended wife should survive, and have issue of her body then living, that she should receive, take and enjoy for her jointure, and in lieu of her dower, a rent-charge of £20 *per annum* payable quarterly; and from and immediately after the decease of them both, and of the longer liver, the heirs of the body of them, and their heirs, should take one annuity of £20 *per annum*.

LORD CHANCELLOR.

Before I pronounce my decree, I would be satisfied of this new practice, that a person may declare or avow upon a deed, of which he ought to make *profert*, setting forth that it is lost; for if so, there is no need to come into this court upon a lost bond, since you may declare upon it; which will make a great alteration in the proceedings of this court (1). Therefore let it stand for judgment.

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February 20, LORD CHANCELLOR delivered his opinion.

Upon the proof the parties have entered into, it plainly appears there was this rent-charge originally created in 1692, though the deed creating it is not produced, and said to be lost: and it appears to my satisfaction that the contents of that deed are properly proved by the contents of that draft; there seldom happening so good proof of the contents of a deed lost. There is clear evidence that the mother of *Fausset* had notice of this settlement, and creation of this rent, and so had the mortgagee in 1705. The defendant himself producing the very lease for a year upon which that release, whereon the rent arises, was founded; there being the very same description *literatim*, and it is recited in all the conveyances.

(1) Vide ante, 345. *Read v. Brookman*, 3 T. R. 151. and per Lord Eldon, C. 6 Ves. 812. 7 Ves. 20. and 9 Ves. 466.

There are three questions on this case. First, whether this rent-charge is now existing, or is barred or extinguished in point of law? Secondly, supposing it existing, whether the plaintiff has acquired any right thereto by the purchase on which this bill is founded? Thirdly, if he has, whether he is intitled to be relieved concerning it, and what that relief ought to be?

As to the first, it depends on the creation of the settlement and operation of the fine; and indeed there is something very particular in the frame of the marriage-settlement and creation of the rent. The principal question upon which it will turn is, whether by the deed of lease and release there was one rent only, or two distinct rents of £20 *per annum*, created? It is by way of use, and exactly the same rent which is limited before; and though it is not said the said *rent*, the question is, whether it is not a limitation of the same rent, notwithstanding there are no such words of reference? The great objection to it is, that possibly the wife might have died in the life of her husband; and then no rent would have arisen to her for a jointure, so that it would have a different commencement from what it would otherwise have had: but though a difference in words it is exactly the same. Yet I incline to think these are two distinct rents, from the distinct manner of creating them: but this being a question at law, I have no right to bind the defendants without letting them have the judgment of a court of law, unless there is some other reason. It is plain that the mother of *Fausset* intended to purchase the whole interest, and that it was apprehended this rent charge was barred by the fine. If there were two rents, then the fine would be no bar to the rent to the heirs of the body; that being in nature of a springing use of the rent, which was not then arisen, but a mere possibility, and no person capable of entering, so as to avoid the fine within the statutes of *non-claim*; and there cannot [391] be a bar so long as it is in possibility. If but one rent, and this limitation to the *heirs of the body* is considered as a further limitation of the rent-charge created, then the mother was tenant in tail of it; for the word *heirs* superadded to *heirs of the body* in a deed, have no operation at all: and then though it was a rent charge *ex provisione viri*, yet the husband joining in the fine, I should be of opinion it was well barred: and that notwithstanding it was out of land, and the fine was not of the rent, but the land, which will not alter the case; for which, if it was necessary, there is an authority in *Carter, 22, Taylor v. Shaw*, that a rent-charge is gone by a fine of the land; which is this very case. This is on a supposition that it should be taken as one rent.

As to the second question, the plaintiff claims as a purchaser for valuable consideration: and it is an odd purchase, and not to be encouraged; because it being in their mother's life, the vendors were not her heirs; not having it in actual possibility: an odd and unusual expression of Lord *Hobart*, page 45. But he meant that it was a kind of double possibility; the rent-charge might never arise at all, or if it did, the two sons at the death of the mother might not be heirs of the body to take it. If they had died in the life of the mother without issue, the rent had been gone: if they had left issue, other persons would be intitled to take it by purchase. Nothing passed therefore by that conveyance in point of law; it being by deed, and no fine; which if it had been levied of this rent, and they had survived their mother, as against them it would have operated

by *estoppel*, binding them and their issue. It is true, in a court of equity a *chose in action* may be assigned, and a possibility which has been for a valuable consideration, and many transactions have been established in equity, which could not at law, and decrees obtained: and therefore, though the admission of the *Caffinches* is not evidence against the *Faussets* against the *Caffinches* it must be taken to be good; and they will be bound by their agreement; so that the consequence is, as against them the plaintiff has an equitable right to this, and is intitled to have the benefit of it decreed.

Then as to the third question; and the plaintiff, being intitled to be relieved against the *Caffinches*, is intitled to have a decree to compel them to make a further assurance to him: which they are bound to do in equity, and also to compel them to permit him to make use of their names as his trustees to recover the arrears at law. This brings on the consideration what further relief the plaintiff is intitled to: whether any decree against the *Faussets*? As to which the plaintiff having purchased only an equity from the *Caffinches*, I am of opinion that purchase ought not to put the defendants, the *Faussets*, the owners of the [392] land and purchasers thereof for valuable consideration, in a worse condition, or make them liable to a different remedy than they would have been in respect to the *Caffinches*, the original owners of the rent. There may be cases where a person may be intitled to claim an equitable right to relief against other persons from the nature of the case, But that is not the present case; for it operating by way of agreement in equity, the *Caffinches* are to be considered as the plaintiff's trustees, and the plaintiff therefore has a right to compel them to permit him to use their names to sue at law, which is the common case. For if there is a purchaser of an estate by voluntary conveyance or agreement, the trustees having the legal estate will not intitle to come into this court against other persons claiming in contradiction to his right. As to them, it is a legal title, and it must be tried at law on demise of the trustees (e): and so the plaintiff is intitled to take his legal remedy for this rent.

But I must distinguish on this part between the *Faussets*, all claiming to be purchasers for valuable consideration without notice: for as to the father, there is clear proof of notice of this settlement and creation of the rent; as appears on the recitals of his own conveyances, and in part by his own admission, and producing, the very lease for year, which makes part of this conveyance, by which the rent-charge is created. But as to the wife and son, it is a different consideration, and not sufficient evidence of notice to affect them; for the suspicion from the deeds being in the hands of the family is not sufficient: for such a settlement as the father made might be made by the apparent owner, without looking into the deeds; and if so, it amounts not to (f) notice, unless something further is shewn.

But if no more in the case, still the plaintiff ought to be left to his remedy at law, against both defendants, and therefore insists farther he has

(e) In the case of quit rent, where the party has a remedy at law, that court will not relieve. 1 Brown, 201. 1 Atk. 598. 2 Brown, 61.

(f) Which ought not to be constructive, but such as will make an impression on the memory. 2 Vol. 370.

another remedy against the *Faussets*, arising from the loss of his deed, the nature of the case, the necessity he is under, if he was to distrain and avow in *replevin*, to make a *profert in cur.* of this deed.

The loss of a deed is not always a ground to come into a court of equity for relief: for if there was no more in the case, although he is intitled to have a discovery of that, whether lost or not, courts of law admit evidence of the loss of a deed, proving the existence of it and the contents, just as a court of equity does. There are two grounds to come into equity for relief, annexing an affidavit to his bill. First where the deed is destroyed or concealed by the defendant: and whenever that is the case, the plaintiff is intitled in this court to have relief upon the reason in Lord *Hunsdon's* case in *Hob.* Another is where the plaintiff cannot recover [393] at law without making *profert* of the deed in pleading at law (1). If a man has lost a bond, he is intitled to come into equity not only for a discovery, but to have a decree for payment; because he cannot declare without making *profert*, the defendant being entitled to *oyer*. It is to be considered then whether this case is within either of these two general grounds. As to the first there is not sufficient evidence to proceed on that. There might be some suspicion from the defendant's producing the lease for a year; but that is only suspicion, and indeed the very cause of it takes off part of that suspicion; because if done with intent, it would be foolish not to have destroyed the other part of the release, but as to the other ground, the defendants insist the plaintiff may do so if he makes distress for the rent in the name of the *Caffinches*, (for at law he cannot do it otherwise) that he may avow, and aver the deed to be lost, and so to be excused from making *profert*. There is no book, case, printed entry, or even modern authority, where that has been established to be good pleading. But in *Bloodwink v. Osborn*, *Trin.* 22 G. 2. in action in covenant for rent in arrear, there was a long title to the rent, created in 1656, set forth; and then a dereignment to the title to the rent brought down in the declaration: and in all the material deeds it was set forth that, the deed was by unavoidable accident destroyed by fire: to this the defendant pleaded two pleas, which were two issues on the title: it was tried before Justice *Birch*, *Trin.* 1748, and a verdict for the plaintiff; which is the whole of that case, and is no authority for this pleading; for the defendant took issue; so that it was too late to take advantage of it; for it should have been demurred to with special cause, and shewn. As to the case of the *King v. Hays*, in *C. B.* in *quare impedit*, it is not yet determined: therefore if it depended on this I never would send a plaintiff to law, who comes into the court on a plain equity, frequently admitted on the loss of a deed, to try his chance whether the judges would establish this pleading. The judges ought indeed to be *astuti*; but the allowing this in pleading will put the defendant or plaintiff in *replevin* under great difficulty; which is to be considered in the letting such new inventions into pleading: therefore I will not give countenance to it before it is established by the judges. The only case having a tendency to this, is in 3 *Lev.* 82, *Carver v. Pinkney*, where the court held a declaration good, *quod* defendant *penes se habet*, without shewing the indenture. But there was a special reason there, which is not here, *viz.* the statute 29 C. 2. of

(1) See before, 345. Post, 505.

augmentation, expressly enabling the vicar, &c. to take a distress, or bring an action of debt: the opinion of the court was, that the plaintiff was enabled to sue by the statute, and might there excuse *profert*.

But this is not the ground I go on, but on another: I am of opinion the plaintiff may sue in the name of the *Caffinches* without *profert*.

This is a conveyance on the statute of uses; and the owner of [394] the rent charge, abstracted from the statute, has no right to the possession of the deed or counterpart; which has been judged a reason to excuse the plaintiff in *debt* or *covenant*, or the *avowant* in *replevin* from producing the deed in court, and may plead it without *profert*. *Dy.* 277, P. 58. *Estoff's* case, *Cr. J.* 217, *Lord Huntington v. Mildmay*, *Cr. C.* 441, *Stockman v. Hampton*, and a more modern case, *Carthew* 315, *Reynel v. Long*; which are several authorities that in pleading a deed under the statute of uses it need not be set out with *profert in cur'*; because the deed belongs to the grantee to uses, and he has no remedy to recover at law from them: so is *Noy*, 145. But though this is so clearly established, I know not but when it is considered, it may be called a spungy reason, as Lord *Vaughan*, says. But there is a better; that the *Caffinches* not claiming the land but only a rent-charge, the charters belong to the owner of the land, both the settlement and counterpart: the owner of the rent-charge not being intitled to the deed: which is a substantial reason, and falls with *Carver v. Pinkney*, because another is entitled to the possession of the deed.

The plaintiff then will not be under this difficulty in pleading, and therefore is not intitled to come into this court for want of a deed, to change the jurisdiction for that cause. But still he is intitled to a decree; which must be first a further assurance against the defendants the *Caffinches*; next the benefit of making use of their names to the distraining or taking any remedy at law for the arrears since the death of the mother. But no attornment is necessary, because it is a conveyance on the statute of uses: and if the further assurance should be executed before any distress made, or action at law brought in the name of the *Caffinches* for the arrears, so that the legal estate of the rent will by such conveyance be out of the *Caffinches*; the *Faussets* shall not set it up, or take advantage thereof.

This is very reasonable question at law; for you may drive the defendant to very disadvantageous issues by this method. The inconveniences are stated clearly in *Layfield's* case, 10 Co. 92. As to that, I give no opinion; being for the judgment of courts of law: but this is not material; if it was, I could have cited *Sowersby v. Sparrow*, *B. R.* 16 G. 2. where upon application to the court to dispense with *profert* because of the inability to give *oyer*, the court would not do it, because it was the plaintiff's fault to bring his action before he had the deed, and not like the cases where the court could help by imparlances. In *White v. Montgomery*, *Mich.* 17 G. 2, in debt on bond the plaintiff said he could not make *profert*, it being in the custody of a stranger: the court would not excuse the want of *oyer*.

Attorney-General.

I have heard Lord King say, that if a person pleaded a

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declaration with a *profert*, and afterward was not able to produce it: upon affidavit of its being lost, he would relieve him on motion.

LORD CHANCELLOR.

I cannot conceive what Lord King meant by that; for that would be a plain error on the record.

VANESSEN v. SOUTH SEA COMPANY, Feb, 24, 1749-50.

(Reg. Lib. 1749. B. fol. 287. Entered "*Van Essen v. Count of Slippenbach*.")

S. C. Dick. 140. *quod vide*—Baron and feme. Practico.—The whole line of process having been gone through against the plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at law, and there may be a decree for transfer of her separate property against the other defendants who did appear.

UPON a bill by a *feme covert* against her husband, he not appearing, and the whole process being gone through without appearance, the question was, whether there could be any decree against the other defendants who were before the court.

That there could, was cited *Parker v. Blackburn*, *Pre. Chan.* 99, which went on a supposition, that if the service of the sequestration had been good, the court would have gone on. So if a necessary party cannot be had, as if he lives beyond sea; in which case the impossibility will be presumed; whereas here it is stronger, being plainly proved: the sequestration being a proof that he cannot be brought. In the case of *Vantyman*, Nov. 14, 1728, who had been divorced by a sentence of *Dantzick*, and came to *England*, and brought a bill for stock, as the husband of his wife, who was a foreigner and beyond sea, against her, and against *Scuman* the executor of her former husband; and *Jacobson*, who had a letter of attorney to receive the dividends, took out process against the wife and *Scuman* who never appeared; and obtained an order *nisi*, that *Jacobson* (who appeared and who received the dividends) should pay him £500 to carry on the suit: against which order *Jacobson* shewed cause, *The Master of the Rolls* said, "That motions of this kind for money to carry on a suit were not to be encouraged, unless where for a sum appearing due in all events; this motion appears to be a sort of distress on the defendants here; can one who is a foreigner, who has a demand only against a foreigner, by changing his place and coming to *England* be intitled to come against a foreigner? It is said he may, because the property is in *England*; but the plaintiff is not without remedy; for he might certainly sue at *Dantzick* even for their property in *England*; and in the case of *Styles*,

Lord Somers, by a decree here, affected an estate in *Holland*.
[396] But this court will not order money to be paid unless so much appears to be paid in all events; and here are not proper parties." There it was a decree against them substantially, and therefore necessary they should be before the court; and Lord King agreed thereto; but the *Master of the Rolls* said he did not know how far the court would go in a case of necessity, to prevent a failure of justice; which is the case here. The plaintiff has proceeded as far as he can; and the consequence of bringing a new, or amended bill, would be only to charge

that the husband is beyond sea, and cannot be brought before the court.

LORD CHANCELLOR.

I will tell you what strikes me: *The Company* are in nature of trustees, so as to admit or deny a transfer on regular grounds: suppose it was a private trust; undoubtedly as the course of this court stood before 5 G. 2, for want of appearance, though you had prosecuted to a sequestration, you could not set down the cause to be heard against the defendant who did not appear. But *Prec. Chan.* 99. does import that you might so far take advantage of having proceeded against the defendant, that you might have a decree against the other parties; so that it would not go off for want of parties. This is in the case of a private trustee. I should think your inference from that case in *Prec. Chan.* right; because agreeable to proceedings at common law; where notwithstanding a joint cause of action, if one will not join, process must be against his companion to summons and severance, and then he must proceed alone. Suppose a joint cause of action against two, it is brought against both, one will not appear: there may be a process to *outlawry* against him; and judgment against him who does appear, reciting the *outlawry*; which is conformable to this case. The whole line of process against the husband is equal to the proceeding to *outlawry* at common law. I should think it sufficient to enable the praying a decree against the company; which is the import of that case, if the process there had been regular. It is proper therefore to recite in the drawing up the decree, that you had proceeded against the husband to a sequestration, and then go on against *The Company*.

The cause stood over to consider how to frame the decree.

ASTON v. ASTON, February 26, 1749-50.

(Reg. Lib. 1749. A. fol. 433.)

S.C. Ante, 264.—Jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. Windfalls of timber, and other casualties, to whom the property belongs. Tenants for life. Remainder-men, &c.

An estate, including the mansion-house and park, was settled on Lady *Aston* for her jointure, without impeachment of *waste*, except in pulling down houses and felling timber: remainder to her son, afterwards Sir *Thomas Aston* for life, without impeachment of *waste* generally: remainder to his trustees to preserve contingent remainders; remainder to his issue in tail: remainder to his eldest sister, (the now defendant) and so to the other sisters, in tail. [397]

Sir *Thomas* the eldest son himself was tenant for life of the greatest part of the estate, without impeachment of *waste*: and wanting a sum of money, the method thought on to raise it was by felling timber on the estate of which he was remainder-man, without impeachment of *waste*.

Sir *Thomas* dying without issue, his sister becoming tenant in tail,

brought an action to recover treble damages, and the place wasted, and had a verdict: and for a perpetual injunction to stay the proceedings thereon, was the present bill by Lady *Aston*.

For plaintiff. Though it was formerly doubted, whether the words *without impeachment of waste* meant more than a defence against the action of waste; it is now held, that it gives the property in the things cut down to the tenant for life during his possession. The court leans against permissive waste, and will not suffer one to make another answerable for what is done with his consent. Suppose one builds on another's land with consent; the court will not permit that land to be recovered on which the building is, looking on it as a fraud: the defendant had clear notice of the intention to do this; nor did she make any complaint for ten years, but suffered her brother to receive the benefit; she had notice of the general right that she was to succeed upon his death without issue; but she had also knowledge of the particular estate. A court of equity will presume the consequences of law upon knowledge of the fact; which knowledge is plain from a bill brought by her in 1725, claiming a portion in that very settlement.

The reading which bill, as she was at that time an infant, was objected to.

LORD CHANCELLOR.

Though it cannot be read on the part of the plaintiff, to shew the allegations in that bill as evidence against the infant; yet it may be read to shew the subsequent proceedings on that bill after she came of age.

For plaintiff. The defendant by her answer admits, that Sir *Thomas* might acquaint her that his mother had been so kind as to give him that leave to sell some timber upon her estate for life, which he intended to do; that she said she was sorry his necessities were such as obliged him to sell it, as it would deface the beauty of the place. It was farther [398] proved, that upon being told he had felled great part of the estate; she answered he might cut down every stick, and that her mother told her that, to set her at variance with her brother. The timber was felling two years after her marriage; neither she nor her husband applying to the court to stay the removal of it. There was a way by which the mother might have given Sir *Thomas* this liberty, viz. by making a lease for 99 years to a stranger, if she so long lived, and surrendering her freehold to Sir *Thomas*, which would have extinguished her estate for life in his; and then by virtue of his own estate, he might have cut down the timber.

For defendant. The acquiescence is nothing; for though she was tenant in tail, the action at law could not be brought during the mesne tenancy for life; and till it is settled whose property it would be, it cannot be known whether *trover* would lie for it, nor could a bill in equity be brought to restrain what is done already; nor a bill for a satisfaction, that depending on the *trover*; for a bill for satisfaction cannot be brought where *trover* lies not. The plaintiff is not to be relieved as in the cases of penalty: this bill must be founded on the defendant's being intitled in point of law: the tenant for life, to be intitled to the property in the timber cut down, must be in possession of that very estate; if it was an express agreement, it

might be pleaded at law to the action. The defendant had not sufficient knowledge of his own right, whether it was a remainder in tail or for life, to do this. It was not determined whether such a surrender as is mentioned would be good; whether one estate for life could be extinguished in another; and that would have brought the freehold and inheritance nearer to the defendant. The present case is like that determined by your *Lordship* last year, between the same parties. [Ante, 264.]

LORD CHANCELLOR.

This is a pretty extraordinary demand made by the defendant, to recover not only single damages (this is no objection to the action) but also the treble value against the plaintiff; of which it does not appear the plaintiff received one shilling advantage; but it was taken for granted that Sir *Thomas*, the brother of the defendant, had the sole benefit of selling this timber. It is plain from whence this controversy has arisen, and it is unfortunate; but that will not be the measure of right between the parties; for courts of law and equity must determine on the grounds of that right, let the motives of pursuing it be what they will. After the brother's death, it was found out in point of law, that this was waste committed with the mother's consent during her estate for life, of which no advantage could be taken during the mesne estate for life. The question is, whether this court should permit that advantage to be taken at law or relieve against it? And I am of opinion there [399] ought to be relief; for there is evidence either of an express consent by the defendant to her brother's cutting down the timber, or a general tacit consent or encouragement on her part to do it: and if that was given during the life of her brother, as circumstances then stood, it would be very unreasonable to suffer her or her husband after the brother's death, and upon a change of circumstances by the value of the timber becoming greater, to take advantage of it. Sir *Thomas* was in possession of the greater part of the estate, on which he might have cut down without account; and though unmarried, being young and likely to have children, consequently whatever information the defendant had, it was not a matter she laid great weight upon. It might be a considerable question whether if timber was blown down or cut by a stranger, it would belong to him in whom the estate was vested in remainder, or the tenant of life. Probably I should think it would belong to him in whom the estate was vested: I should incline to think so from the reason of the thing: though not determined by any judicial determination (1). * When she was first acquainted with it, which I presume was before her marriage, she did not go to her mother, or object thereto, or tell Sir *Thomas* he had no power to do so. She knew she had some right to take this estate; whether of inheritance or not, if he died without issue. The answer imports she was sorry he should do this to his own prejudice, not her's: but it rests not there; for the evidence imports that she acquiesced with this power given her brother (and it is not material whether before or after her mar-

* This was said to have been also Lord *Cowper's* opinion in the Earl of *Lindsay's* case.

(1) Both Lord *Macclesfield* however, and Lord *Talbot*, had expressed their decided opinions in coincidence with Lord *Hardwicke*, *ubi supra*; moreover adding, it had been determined. See Mr. Cox's note to *Bewick v. Whilfield*, 3 P. W. 267. 268. 5th edit.

riage; for though after marriage, it would be evidence against herself): she considered him as the head of the family, from whom she might expect favours; and would not enter into a contest with him for such a remote chance, which might induce him to hurt the other part of the estate of which he was in possession. I do not rely on its being an express agreement, which might be pleaded at law, if so: but that it was an acquiescence and encouragement, which is sufficient to indemnify the mother. What equity against the executor of her brother in *Trover* or other action is not the question: but that she should have taken the advantage of the illegality of the act at the time it was illegal. It does not clearly appear, whether she knew her's to be a remainder in tail or for life; it is not very material that she did not know that she was tenant in tail; for if she was tenant for life, subject to waste, (for if without impeachment of waste it would be very material), there is a great difference between a remainder of an estate falling into possession with timber upon it, and when stripped thereof; for tenant for life is intitled to the loppings, &c.

If it is determined here, that where there is tenant for life, remainder for life, remainder to the first and every other son of the last remainder-man; if the first tenant for life subject to waste commits waste, the second tenant for life may bring a bill in this court to stay waste, which cannot be demurred to. *Dayrel v. Champneys*, Eq. Ab. 400. and I take it, the court would do this to benefit the inheritance, where law would not admit the action of waste to be brought. In this case the mother might have let Sir Thomas have the liberty with great ease, although the defendant had objected to it by the method mentioned; for I take in the first estate for life might be extinguished by the other: as in *Perk*. 113, A. title *Surrender*, which gives the reason for it, and is a good authority; and *Bro*. title *Surrender* 17. Then consequently Sir Thomas might have done this lawfully (1); and no one could have called him to account for it; and the mother would have had the rents and profits of the estate for 99 years if she so long lived; and the freehold's being nearer to the defendant would be no advantage; for the difference of having a naked freehold or an estate for 99 years in the mother, is so slight that it is of no consequence. Then when this is the case, after this length of time, and the brother's death, this court should not permit this advantage to be taken against the brother's executor. But the point I go on is, that her conduct was an encouragement to draw the mother in. There is no similitude between this and the case I determined last year. (2). I went there as far as I could to assist the present defendant, the plaintiff there. The ground I went upon was, that the plaintiff there had no evidence of her own, but was forced to read the mother's answer, which turned out against the plaintiff; whereas here is plain evidence, if not of an actual agreement, of an acquiescence leading the mother into this.

The injunction therefore already granted ought to be made perpetual. But no costs at law or in this court; for I question whether on either side

† So determined by his Lordship in *Parrot v. Parrot*.

(1) But not if trustees were interposed to preserve contingent remainders. See per Lord Eldon, C. 10, Ves. 278.

(2) Ante, 284.

things were fully understood: and I believe there were some mistakes; which ought not to turn so much to the benefit of one side, and prejudice to the other.

COCKING v. PRATT, *March 7, 1749-50.*

(Reg. Lib. 1749. A. fol. 287.)

Sir JOHN STRANGE, in the absence of LORD CHANCELLOR.

Relief against agreement made under a misconception of right.

Agreement as to distribution of personal estate set aside, although ratified; the value appearing much greater than was known to the plaintiff at the time.

Plea of inventory delivered and approved, and agreement founded on it without fraud; allowed in an antecedent stage of the cause.

J. JELF dying intestate left a widow, and daughter then an infant; who four months after her coming of age, enters into an agreement with her mother concerning the distribution (1) of the personal estate: which agreement is afterwards ratified by the daughter's husband; who after the death of his wife brings a bill as her administrator, to set aside the agreement, and to have a distributive share out of the father's personal estate, to the amount of what his wife was intitled to.

The mother insisted on this agreement as a defence against going into an account of the father's personal estate.

MASTER OF THE ROLLS.

[401]

The plaintiff's bill is proper: and the right of the parties the same as if his wife was alive. The question is what was in view on each side. The daughter clearly did not intend at the time of the agreement to take less than what by law she was intitled to, her two-thirds of the value; though what that was did not clearly appear to her; but she then thought what was stipulated for her was her full share. Though there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between a parent and a child just come of age, and interpose if any advantage is taken. The mother plainly knew more than the daughter; and only says in general, she believes she concealed nothing from her. Whether there has been *suppressio veri* is not clear upon the evidence. But there is another foundation to interpose, viz. that it appeared afterward that the personal estate amounted to more: and the party suffering will be permitted to come here to avail himself of that want of knowledge: not indeed in the case of a trifle, but some bounds must be set to it. The daughter would be intitled to 5 or £600 more; which is very material in such a sum as this, and a ground for the court to set it right; the daughter did not act on a composition, as wanting to marry, and to have ready money; but took this as her full share: and if it appears not so, the court cannot suffer the agreement to stand. As to the ratification and release by the husband: he was as much

(1) See *Bingham v. Bingham*, ante, 126. and *Ramsden v. Hyllon*, post, 2 Vol. 304.

in the dark ; this estate therefore should be divided as the law directs, and the agreement set aside.

In this case was cited *Griffith v. Frapwel*, June 26, 1732, where one died intestate, leaving two sisters, the plaintiff's wife and the defendant's wife ; the latter first got administration, and prevailed on the other to accept of an agreement for her share. There was a further agreement, that the plaintiff's wife should have a further share, reciting that it was intended she should have an equal share, and that there should be a decree for that. The plaintiff afterward discovered the estate to be a great deal more, and brought a bill of review ; and both the decree and agreement were set aside.

[402] LONGUET v. SCAWEN, March 10, 1749-50.

(Reg. Lib. 1749. B. fol. 130.)

Grant of annuities during life of the grantee, in satisfaction and discharge of a debt, the grantor not to be liable personally, but reserving a power to re-purchase and redeem the annuities. Held part of the personal estate of the grantee, and similar to the case of *Welch* mortgages.

The court leans against a contract for liberty to repurchase where made at the same time, as the grant, and endeavours to make it a redemption.

In a *Welch* mortgage there is a perpetual power of redemption in mortgagor ; and mortgagee cannot compel a redemption or foreclosure.

SIR THOMAS SCAWEN had created a term for 99 years if he so long lived, out of several estates, of which he was tenant for life ; and being debtor to *Samuel Swynfen* for £6600 made thirteen several grants ; twelve of £50 *per ann.* and one of £80 *per ann.* to *S. Swynfen*, his heirs and assigns, for the natural life of *Sir Thomas Scawen*, to be issuing out of the several lands and tenements, which in a certain indenture, prepared and intended to be the same date, are demised to trustees ; which conveyance was by a sextipartite deed of the same date, by two several terms, in satisfaction and discharge of the several sums, that as long as *Samuel Swynfen*, should quietly hold these premises, unmolested by *Sir Thomas Scawen*, upon the trusts and to the ends mentioned therein, according to the intent of it, *Sir Thomas Scawen* shall not be personally liable, nor be sued in law or equity, nor his goods, &c. to be liable, to the payment of these annuities : provided always and agreed that it shall be lawful for *Sir Thomas Scawen* in satisfaction and discharge of the several sums from time to time to repurchase and redeem the said rents at the same price, upon notice given on any of the four quarterly days on which they became payable during his life.

Then there was another clause in the declaration of the trust of the former term for 99 years, which was assigned on trust for the better securing the annuities and debts before provided for ; indemnifying them against any mesne charges that might be brought on the estate ; subject nevertheless to the same equity of redemption as above.

Samuel Swynfen having made a will, in which there was a clause obliging his heirs at law to ratify and confirm his will, and execute a release of any claim to his real estate, otherwise to take nothing out of his real or

personal estate, died: which occasioned a controversy, between his heirs at law, and those claiming under the will, concerning these annuities.

For Plaintiffs. These annuities must be considered as personal estate, and falling into the residue, however limited; for if limited to heirs, *heirs* must be taken according to the subject matter, and mean *executors*. They issue out of a chattel, and a freehold cannot be carved out of a chattel; for the stream cannot rise higher than the spring head. As to the nature of the transaction, it is a security for the money, there being a clause of redemption: and this was the only method, being tenant for life, in which he could do it, viz. by granting annuities, giving greater than the legal interest, which may be done this way. Then by the rules [403] of this court the money must be paid to the representative of the personal estate; which rule was not established immediately; the condition being to be performed to the heir, in point of law: but it is now settled that it is part of the personal estate; this court considering it was a debt or incumbrance; and therefore though the mortgagee cannot compel a redemption, the heir at law of the mortgagor has a right to compel the executor to apply the personal in ease of the real: as in *Howel v. Price*, *Prec. Chan.* 423, 477, of a *Welch* mortgage; in which the rents and profits are to be received without account till the mortgagor pays the money: although courts of equity have interposed where the rents and profits have greatly exceeded the interest, because such are in nature of an usurious contract. If then it is a debt on one side, it must be a credit on the other, and to be considered as a security for the money lent. Nor should it be left in the power of a third person, Sir *Thomas Scawen*, to determine whether it should be real or personal estate of *Swynfen*, as that might open a door to collusion either with heir or executor. But if the court should think it real estate; yet from the particularity of this will, the heirs at law are obliged to convey to the uses therein; for as by the general rule of the court, there is no occasion for the testator to provide that a claimant under his should not disturb his will, he must have meant something farther than the bare confirming the will.

For Defendants. This is to be considered as the real property of *Swynfen* both in law and equity: the annuities are redeemable only on notice to the heirs and payment to them; by which alone can Sir *Thomas Scawen* be intitled to the re-purchase; for it is only a purchase, with liberty to repurchase. Nothing can be redeemable but a mortgage; to which two things are necessary; a debt due to the mortgagee from the mortgagor, and an estate as a security for the repayment: and there is a clear distinction between a mortgage and a repurchase, as in the latter, there is no debt due: the nearest case is that of a *Welch* mortgagee, but not applicable to the present; there the express contract being that the party shall have a right to redeem for ever; which being part of the agreement entered into, may be made use of: nor will a court of equity relieve against it. And a *Welch* mortgagee is always supposed to be put into possession immediately.

LORD CHANCELLOR.

Not always.

For defendants. In redeeming an old *Welch* mortgage the court does

not look for the personal representative to be made a party: the clause of redemption was inserted for the benefit of Sir *Thomas Scawen* only, and not as a security; for to that it is necessary a debt should be owing and subsisting; the deed supposes the entire debt is discharged and gone, and then the clause of redemption is inconsistent. It must be considered therefore as a purchase of these annuities, not as a security. There can be no debt, because no remedy for it; for during these annuities *Swynfen* or his executor cannot bring an action for it, or come here for a redemption or a foreclosure: and therefore Sir *Thoman Scawen* can have no power to compel a redemption; for it ought to be reciprocal. Although other persons might put a period to the interest of *Swynfen* in these annuities, that will not make it the less real property; like the intermediate interest descending on an heir at law till the happening of a contingency on which an executory devise is to take effect; till when it shall have all the properties of an inheritance, of a base fee; which shall not be varied by the possibility of having a period: the money ought in this case to go to the heir at law, as in the cases of eviction, where the satisfaction shall go to the person evicted. As in *McKensie v. Robinson*, March 18, 1741, where a real estate purchased was devised to the testator's brother; which proved a bad title in the testator: it became a contest between the devisee and the personal representative, and it was insisted to be the same as if the testator had never laid out his money. Your Lordship held that the money came in lieu of the other; and that the person who would have the estate, had the title been good, should have the money. So in *Coventry v. Carew* (1), July 1742, where the testator devised a real estate which was to come to him in exchange for another: the exchange was refused; and it became a question how the interest in the testator's estate should go? Your Lordship held it should go in the same way as the estate in lieu of it would have gone. It is a general rule that once a mortgage, and always redeemable, and cannot be made irredeemable: whereas this is irredeemable, if Sir *Thomas Scawen* does not think fit to redeem it; by the express contract and proviso of the deed the party is to be paid the arrears of the annuity up to the day of redemption, and then to be paid the whole money, which is £10 per cent. what the court will never allow: it is to be considered therefore as a purchase, subject only to repurchase; not as a mortgage or redemption.

LORD CHANCELLOR.

The general question is whether these annuities, how made part of the estate of *Swynfen* of one species or another are to be considered in this court as real or personal? Several questions have been made: First in respect of the estate out of which granted. Next in respect [405] of the redeemable nature of the annuities. Thirdly supposing it real, and consequently descendible to the heir at law, not only in point of legal estate, but in point of interest and right, whether the heir at law, within the clause obliging him to confirm and ratify the will, should not be obliged to release? which last question I have postponed till the opinion is given upon the second, to see if it be material or no: and upon that second question, I am of opinion that in the eye of

(1) S. C. 2 Atk. 366, "where the facts are fairly stated, but the judgment is probably better given in Mr. Joddrel's notes." Per Lord Eldon, Chancellor. 10. Ves. 616.

this court these annuities ought to be considered as part of the personal estate of *Samuel Swynfen* and if now gone to the heir at law, he is to be trustee for the executor and the personal estate; which will depend on the nature of the agreement entered into, and of the grant or the securities.

First considering the transaction whence it arose: originally there was a debt of *Swynfen*; in what manner secured does not appear, nor is it material. *Swynfen* was desirous of having a further and better security, as it is called one side: on the other a satisfaction and discharge of that debt. The method taken to do this was not by granting lands or any thing absolutely to *Swynfen*, but by dividing the debt into so many parts, applying to the particular annuities granted; turning it into a purchase of so many annuities; the meaning of which was for the convenience of *Sir Thomas Scawen*, that he might redeem any one of these annuities on payment of the money: otherwise there is no sense in it; for it is equally for the benefit of *Swynfen* to do it by one grant as by several. It is true that *Sir Thomas Scawen* had parted with the beneficial interest by that trust term: but a dry naked freehold in notion of law still subsisted in him. He by possibility might have outlived the term; and granting the annuities during his life was a grant out of the freehold to *Swynfen pour autre vie*, determinable by the death of *Sir Thomas Scawen*, and would issue in the consideration of law partly out of the freehold: but during the existence of the prior term, the profits of the annuities and of the estate, which the trustees covenant to apply for that purpose, must arise out of the several terms for years; which, though not decisive, is an ingredient to shew how they transacted it, and that the terms were what they relied on. I agree that being by way of grant by the owner of the naked freehold during life, it will operate out of that, after determination of the several terms; but undoubtedly the personal part and chattel interest was that out of which the annuities were to arise.

Then comes the great question, whether they are real or personal? which depends on the consideration whether they are redeemable and as securities for money: and they are clearly so. There is indeed a distinction in the nature of the transaction, between a power of redeeming and of repurchasing, obtained by usage, which governs the sense of words. But it is well known that the court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same [406] time, concomitant with the grant, as it must be considered in this case; being part of the same transaction; the court going very unwillingly into that distinction, and endeavouring if possible to bring them to be cases of redemption. Although it is a different thing where the contract for liberty to repurchase is after a man has been some time in possession of an estate, and acting as owner under a purchase: But this is clearly a power of redemption in *Sir Thomas Scawen*, from the words and frame of the deed itself. In the *proviso*, which in point of law is in *Sir Thomas Scawen, repurchase and redeem* are used synonymously: afterward it is called an equity of redemption, though before it is a legal condition. As to the objection that no mortgage (which imports a security) is without a debt, and that these debts are declared to be paid and discharged: it is true those words are used in the beginning of the deed, and afterward in the *proviso* of redemption: but that was in respect of the discharge of the person of *Sir Thomas Scawen*, as long as the trustees should receive the profits to apply

the annuities, as appears from the clause immediately preceding the *proviso*. As to there being no debt, because no remedy: I agree there is no remedy for it by *Swynfen* or his executor; but that does not differ from the case of a *Welch* mortgage; which is a perpetual power of redemption, subsisting for ever, and the mortgagee cannot compel a redemption or a foreclosure; in which Lord *Cowper* declared there was a debt, and as such determined it should be paid out of the personal estate of the mortgagor in exoneration of the real. If a personal thing on one side, it must be so on the other, and must be due to the mortgagee or the representatives of his personal estate; for there is no possibility in the law of *England* to make a debt real, though in the law of *Scotland* there is such a thing as an heritable debt: therefore it must be a personal debt on the other side: nor will it differ, that the mortgagee had not taken an actual possession. It is true this court considers length of time even in these cases to avoid inconveniences; but still from the nature of the contract they continue redeemable during the continuance of that condition. Therefore the redemption of these annuities is properly compared to a case of that kind, of a redemption of a *Welch* mortgage. The cases of eviction are of a different consideration. It is true in general, that the court does not look for the personal representative to be made party to a bill to redeem an old *Welch* mortgage: that is to excuse the want of parties; the court leaving them to controvert the matter between themselves. But that would not determine the question, which would remain the same, whether not to be considered as personal estate: and I think in the case of a recent *Welch* mortgage the rule is the same. It is true

[407] the power ought to be reciprocal; but that is answered by the case of the *Welch* mortgage; Lord *Cowper* holding that there is no power in the representative of the mortgagee to compel mortgagor to redeem or foreclose, the contract being of a different nature. Suppose the grantor had in the life of *Swynfen* given notice, and paid the money; undoubtedly that money would have been part of the personal estate of *Swynfen*, and gone under the direction of the will. Then whether the money was paid in his life, or to his executor or heir, that will not vary the right, which will be still the same; and there is weight in the argument that otherwise it would be in the power of Sir *Thomas Scawen* the mortgagor to determine the question between the executor and the heir, whether this should be considered real or personal estate of *Swynfen*. As to the allowing 10 per cent. that question is not material between the present plaintiff and defendant: it may come to be material between Sir *Thomas Scawen* and the representative of *Swynfen*, when he comes to redeem; but the question as to these is, whether redeemable or not? If redeemable, whether it belongs to the real or personal estate? and I think the latter, and to be accounted for as such.

I will not enter into the other question relating to the condition in the will; which is capable of a good deal of argument. But I may say on that part of the case, that what the heir at law contends for is contrary to the testator's view (1).

(1) The court declared the annuities were redeemable, and ought in a court of equity to be considered as part of the testator's personal estate. R. L.

BROWN v. PRING, *March 12, 1749-50.*

(Reg. Lib. 1749. A. fol. 423.)

Undue influence and misrepresentation—Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grandmother giving other monies in trust for the infant, and directing that he should not be so chargeable. Stated accounts set aside; the items being very gross, and the settlement obtained from a person just come of age under a misrepresentation. Bond obtained from the infant's grand-mother for the amount of bill of fees and disbursements, directed to stand as a security for moneys justly due on account, and the bill ordered to be taxed (1).

SUSANNAH BROWN by deed poll deposited in the hands of the defendant £400, which, after some particular directions, should be for the use and accommodation of the plaintiff her grandson, if he should not be sufficiently provided for by his trustees during his minority, in such manner as the defendant pleased; with a clause, that the defendant, his executors or administrators, should not be chargeable with interest.

The grandson, now at age, by his bill prayed that the defendant should account for the interest of this £400.

It was insisted that the representatives of *Susannah Brown* could not demand interest in contradiction to the contract, which was not impeached for fraud.

It appeared that £200, part of this was the plaintiff's own money which had been recovered in a clause wherein the defendant had acted as solicitor for *Susannah Brown*, and in which decree [408] there was a particular direction for placing out the estate, part of which this was, at interest for benefit of the infant, the now plaintiff.

LORD CHANCELLOR.

I never saw such a deed as this. It is in the nature of a testamentary disposition; the meaning was to make the defendant a trustee in nature of an executor; and the estate of the testatrix is put into the hands of the executor during her life, and to lie without interest: which indeed may be done, if persons will, with their eyes open, and no fraud or imposition; but it is an extraordinary transaction, and speaks an extraordinary influence. As the deed is not impeached for fraud, I cannot carry it farther than to make him answer interest for £200 trust money; for which I think he ought, as he knew it to be such; and though it is objected that an executrix or trustee, as *Susannah Brown* was with regard to this money recovered, may pay it as they please, making themselves liable: that is true in general. But wherever I find a solicitor in a cause, in which an infant is concerned, and in which there is a direction for placing out that infant's money at interest for his benefit, who receives the money from the executor or trustee; I will make that solicitor pay interest for that money, let his contract with his client be what it will. He knew that £200 was part of the estate of the infant, which he knew (for he must know what the decree was) his client ought to have placed out at interest, and yet takes it to lie

(1) This point appears only in R. L.

without interest: for that £200 therefore he shall answer interest at 4 per cent.

The bill also prayed an open account of all the transactions between the plaintiff and defendant after the grand-mother's death, and to set aside several accounts.

LORD CHANCELLOR.

Here was a continuance of the same influence over the grandson, obtained and preserved by very wrong means. Nothing tends more to the destruction of young persons, than being supplied with more money than what their parents, who have the proper authority, or guardians, or this court, if none are appointed, allow. If his guardians were niggardly, there should have been an application to this court to increase his maintenance, which is very frequent. But the first account is said to be an agreement or composition of a cause; which indeed the court favours; and will not, upon the question whether either party is in the right or wrong, overhaul an agreement by parties with their eyes open and rightly informed. But here was clearly imposition in stating this account: however the most beneficial way to all will be to let this account stand, with general liberty to the plaintiff to surcharge and falsify. But all the other pretended accounts, must be set aside from the objections to the *Items* therein; which are such as to induce the court to go farther to surcharge and falsify. Here is one *Item* "for all law charges." Another, "what you please for bill of fees and disbursements;" without any bill brought in; and a gross *Item* it is; such as I would have ordered [409] ed to be set aside, if done with one of advanced age. *Item* "for the risk run in money laid out:" whereas there was no risk. Had he advanced his own, he had run great risk, and would have deserved to have lost it. This is misrepresented to the plaintiff on his coming of age; which infects the whole; and from that time a general account must be directed. (1).

(1) "The payments which had been made by the defendant on account of the sum of £400 were to be first applied in discharge of the £200 the remainder of the said £400, which was *Susannah Brown's* own money, and afterwards in discharge of the interest of the £200 which belonged to the plaintiff's father's estate, and lastly, towards sinking the principal thereof." Reg. Lib.

WRIGHT v. WRIGHT March 15, 1749-50.

(Reg. Lib. 1749. B. fol. 278.)

S. C. ante, 326.—On appeal.—Devise of land on contingency to *Robert* "or his heirs." *Robert*, before the contingency happens, conveys "all his right, title, claim, and demand" therein, by deed, to his younger son, and his heirs, as a provision, and dies. The contingency happening, *Robert's* heir cannot claim this against his father's act: "or" construed "and."

Possibility assigned in equity for valuable consideration; and love and affection to a child is a consideration in the second degree, and operates by way of agreement, and will be made good like the case of defective execution of a power, or devise of copyhold without surrender.

WRIGHT devised to his two daughters *Mary* and *Sarah*, and their heirs

and assigns, lands in *Downham*; but if either of them should marry without consent of his executors, the daughter so marrying should have only an estate for life therein (1): if either of them should die married, his son *Robert*, or his heirs, should take it to him and his heirs: paying £500 to the other daughter (2).

Robert in 1728 in the life of both his sisters made a conveyance that, whereas his sisters were intitled to the possession and rents and profits thereof during their lives, and immediately after their death he was under the same will intitled to the reversion thereof to him and his heirs, in consideration of natural love and affection and advancement to his son *George*, he conveys and grants [to him and his heirs] all that and all other lands, &c. whatsoever, whereof he, or any one in trust for him, had any estate either in law or equity in possession, reversion or remainder, and which he had any right, title, claim, or demand to under the will of his father in *Downham*.

Robert died in 1731, *Susan* died unmarried in 1744. This bill was brought by the eldest son and heir at law of *Robert* (3) to have this estate on payment of £500 to the other daughter *Mary*, who had married with consent.

For plaintiff. The intent upon the bill was, that if either daughter died unmarried, in order to preserve this estate, the provision before intended should be turned into a pecuniary portion; to the benefit of which contingency *Robert* should be intitled, if alive when it happened: if not, his heir should; taking by description of the person, not by descent as deriving through his ancestor. So that *Robert* had not even a possibility during the life of his sisters. But if he had, he could not dispose of it.

2 *Rol. Ab.* 48. *A. and Bishop v. Fountain*, 3 *Lev.* 427. The only [410] instance where the assignment of a possibility in equity has been fully established is only the possibility of terms; but even that is not allowed but for valuable consideration: *Thomas v. Freeman*, 2 *Vern.* 563. But as to a possibility arising on a freehold estate, it is never allowed. Beside, he was deceived in his grant, not knowing how his interest stood; supposing his sisters were but tenants for life. But though a court of equity might make this good in the case of a purchase for money; yet not in the case of a child.

For defendant. Whenever this contingency happened, it was given to *Robert* and his heirs: for or means and; which contingency descends; and the plaintiff can only claim it by the limitation to him and his heirs; and then *Robert* might dispose of it. Springing uses could not exist at law before the time of *H. 8.* the rule of law was that *chosen in action* should

(1) "And then, or if either of them should die," &c. R. L.

(2) "And he devised a rent-charge of £20 per annum for life to such daughter as should marry without consent as aforesaid." It appears also that the testator made a codicil to his will, whereby "in order that his two maiden daughters *S.* and *M.* might have something to dispose of in case they or either of them should die unmarried, and he gave to either of them that should first die unmarried, and their heirs and assigns, his meadow in *D.* to be disposed of as she should think fit; and if they both died unmarried, he gave to which of them should die last his meadows in *J. H.* &c. to her and her heirs." Reg. Lib.

(3) Against the younger son, *George*, unto whom the conveyance had been made. The cause now came on by appeal from the Rolls; when the decree, which had been in favour of the plaintiff, was reversed. R. L.

not be assignable, to prevent contests, and preserve the possession of the terre-tenant; all which doctrine appears in *Lampet's* case. But when executory devises and springing uses came to be engrafted in the law, the court has leaned to support the disposition of contingent interests. In *Hobson v. Trevor* (1), the son of the late *Master of the Rolls* contracted to settle what should to him from his father; your Lordship decreed that he should perform it: though that was not *in esse*; and much less than a contingent interest. So was *Beckly v. Newland* (2): which shews this court considers even mere possibilities, on the foot of contracts, should be performed, and will carry assignments into execution, as it will contracts. If then a court of equity will do this for a legal consideration within the statute of *Eliz.* it will for that which is a consideration in equity only, *viz.* a natural consideration; for no assistance is given in this court to a purchaser that is not given to a wife or child, against the heir especially, executor or volunteer. As in a devise of copyhold; the want of surrender whereof makes it as void a devise at law as this assignment is void at law. So in powers defectively executed; and whether provided for or not, is immaterial here, the father being the judge of it. In *Harvey v. Harvey* (3), where Mrs. *Harvey* came to have the execution of a power for the addition of her jointure; your Lordship decreed she had a right to have it supplied, whether provided for or not, against a remainder-man under a settlement.

LORD CHANCELLOR.

This is a claim by an heir at law against the act of his ancestor, done for what this court calls a valuable consideration in the second degree, by way of provision or advancement for a younger child. There are two questions. Whether *Robert* had such a contingent interest, or right, or possibility, in the lands in question, as by any act in the consideration of this court he could convey, assign or dispose of? Secondly, sup-
[411] posing he had such a contingent interest as a possibility is properly described to be, whether in fact he has conveyed it by the deed he has executed.

As to the first. I think he had such as he could dispose of under certain terms and circumstances, though not in all events whatever. Whether this possibility was in him, depends on the disjunctive words in the will; and I am of opinion he must take as through his ancestor, and as heir. It is a miswriting therefore: and *or* should be construed *and*; which is a frequent construction: as in a devise or grant to one *or* his heirs; to hold to him *and* his heirs; it is a fee. As to the nature of the interest here given; the will is very oddly worded; what might mislead them into that recital in the deed was, that if the estates were turned into estates for life, he would have a vested remainder. But it was still an executory devise, not a remainder on a fee given before; and in a reasonable compass of time, of the life of the daughters, will thereby go to *Robert* and his heirs: in which case if the first person dies before the contingency

(1) Before Lord *Macclesfield*, 2 P. W. 121.

(2) 2 P. W. 182.

(3) Barn. Rep. Ch. 109.

happens, his heir takes by descent through him, not by purchase. (h) But that is still in notion of law a possibility; which though the law will not permit to be granted or devised, still it may be released, as all sorts of contingencies may, to the owner of the land. The reason of the law's not allowing such a disposition, which this court will, are mostly very refined; and Lord Cowper says in *Thomas v. Freeman* (4), these sort of notions would not have prevailed now. But however the law must be taken as it is. There was a wise reason in the law's not allowing a right to sue to be assigned; that it tended to *champerty* and *maintenance* to pass debts into the hands of the more powerful to oppress lower people. Yet it is now established in this court, that a *chose in action* may be assigned for valuable consideration, and this may be released as a *chose in action* may: and then why may not it be put into such a shape as to be disposed of to a stranger, or to make him trustee for a stranger? This court admits the contingent interest of terms for years to be assigned for valuable consideration, though the law does not; and farther permits them to be disposed of by will; as in *Wynd v. Jekyl*, 1 Will. 572. But that depends on the same reason as a bequest of *chose in action*, viz. that the court will not suffer an executor or administrator with the will annexed, to claim in contradiction to the will; and beside will make it good in the case of a consideration; as in *Theobald v. Defay*, in the *House of Lords*, 1729, which was the strongest case; being an act of a *feme covert*; and yet it was established; and I should not doubt in the case of an assignment of a term for years, not for money, but for a younger child, this court would make it good against the other children, and the executor or administrator. But this is said to be a contingent interest or possibility of an inheritance, and that there is no case of making that good; as to which [412] there is no difference in the reason of the thing between that and the allowing of an assignment of a possibility of a personal thing or chattel real; the heir must take by descent and suggestion from the ancestor. Then consider how far the cases have gone of *Beckly v. Newland*, and *Trevor's* case. The latter goes a great way. There was an agreement on marriage to settle all such lands as came by descent or otherwise from his father; which this court carried into execution, notwithstanding an expectancy of an heir at law in life of his ancestor is less than a possibility. It is such as he may bind himself; in law, the heir may levy a fine of lands in the life of the ancestor, which will bind by *estoppel* after descent to him. So there is a method of conveying, that is, preventing a claim against it: and so here he may release. In that case it was made good by way of agreement for valuable consideration; then how does an assignment differ from it? An assignment always operates by way of agreement or contract; amounting in the consideration of this court to this that one agrees with another to transfer, and make good that right or interest; which is made good here by way of agreement. So was *Beckly v. Newland*, which was as little to be favoured as any case whatever. I agree that to some purposes, the present consideration is not so strong as that for money.

(A) 11 Mod. 127. 152. 2 Rol. Rep. 129. 4 Co. 66. 10 Co. 50. Possibilities of personal estates are devisable, as well as assignable, in equity. Fearn, 439. Pollerf. 44. 2 Freem. 250. 9 Mod. 101. 2 P. Wms. 608. 1 P. Wms. 572. 3 P. Wms. 132.

If the question came to be between the child so advanced for love, &c. and a creditor *bona fide*, the equity of the creditor will be superior to that of the child: but as against any claiming voluntarily from the father, as executor, administrator, or heir at law, it is a consideration, and only made so in the second degree, where the question is with a creditor who is a purchaser. Then why does this operate by way of agreement? Suppose the father had entered into a contract with his son, that in consideration of natural love and affection, and the advancement he was naturally bound to make for him, he agreed for himself and his heirs this younger son should have the lands when the event should happen, the heir would be bound; and upon a bill brought against him the court would have decreed it on the foot of the equitable consideration, and within the cases of making good defective executions of powers, and a devise of copyhold without surrender. This is the same thing, though not in that shape; the court not laying weight on the manner, but the substance. If that was the consideration in *Harvey v. Harvey*, there was much stronger objection thereto; for there was not a colour of an attempt to make it good. But I agree with the plaintiff that this would not have been good by a will, and I think all these cases of personal things differ from cases of real estate; in which, if not well devised in point of law for want of a legal manner of executing the instrument, or of power in the devisor, the heir may claim in contradiction to the ancestor, in a different manner from executor or administrator, who must claim according to the will.

[413] The next question is, supposing this so, whether he has in fact assigned or conveyed? That he intended it is no doubt; although it is awkwardly drawn: it was taken for granted that Sarah would die unmarried. He has taken upon him to convey every thing: though he has unluckily left out the most proper word *possibility*. It is true, he had no immediate claim or demand; but the word *claim* may describe it in *presenti* or *fuluro*; and there is a covenant for further assurance. This therefore is well described; and it is incumbent on this court to make the most liberal construction for its taking effect, because it is in the case of a younger child.

The plaintiff therefore has no right to this redemption for £500, as he claims by his bill: but it must be dismissed with costs.

ATTORNEY-GENERAL v. SCOTT, February 23, 1749-50.

Presentation to a living. Twenty-five trustees were to meet, and to present and elect a clergyman—one dies; the rest are equally divided; half being in favour of *A.* the rest voting for *B.* Upon the death of the supporters of the latter, the friends of *A.* meet and sign a presentation for him. This is void at law, and cannot be supported in equity. There should have been a distinct notice for the meeting of all. A direction that the trustees should meet for such purpose “within four months” from the death of an incumbent, does not prevent their meeting after that time. Trustees cannot make proxies to vote in such a personal trust as the above; though if a choice were regularly made at a proper meeting, they might for the mere purpose of signing the presentation. Disusage, evidence of abandonment by consent, as to part of a constitution, which arose from consent.

An information not to be dismissed, though the relief prayed is wrong, if any directions necessary. See *Attorney-General v. Parker*, ante, 43.

Where the right to affect a minister should not devolve on the parish at large.

Two bills were brought relating to the election of a minister for the parish of *Leeds*.

By a decree of Lord Chancellor Bacon, twenty-five of the principal inhabitants of the parish were to present and elect a proper person: being thereby appointed trustees to meet for that purpose within four months after the death of the incumbent; with directions to keep the trust filled up: and this presentation by them or the major part of them was to be approved of by certain assistant preachers.

The last incumbent died in *February*, 1745, but it happened that by the death of Sir William Milner, one of the trustees, a short time before, there was then an equal number of trustees, who upon notice given in the church to consider the method of proceeding, met 22d *March*, 1745. The candidates proposed were Mr. Scott and Mr. Kirkshaw. They were equally divided, twelve against twelve, so that then there was no election. Thus it rested till the latter end of *July*, 1746; when one of the trustees who voted for Kirkshaw died: upon notice of which *August* 6th, the friends of Scott determined to meet on the 7th; at which meeting seven of them were present in person; and five more by proxy, and signed the presentation of Scott; which they sent to the other trustees, who did not think fit to sign it.

The first bill was by Scott, as principally concerned, and the trustees voting for him; the end of which was singly to establish his election, and to compel the other trustees, who differed, to join in the presentation of Scott, to make an effectual legal presentation to the Archbishop ordinary of the diocese, to compel an induction.

The second was an information at the relation of Kirkshaw, [414] and several other inhabitants of the parish, to establish an election set up for him in the inhabitants of this parish at large, and for a regulation of the charity.

LORD CHANCELLOR.

The first bill must be determined; for if Scott had gained a right under his election, it puts the other out of the case.

This is one of those cases, which proves the wisdom of the general ecclesiastical constitution of this country in vesting the right of collation to a living in general in the bishops of the several dioceses, or in the patron of the particular church; which is supposed to arise from endowment; which may be by accident. And it appears that when people to amend in particular cases go out of that general rule, it is commonly attended with inconveniences. In speculation, the election of ministers by the people sounds well, but it is not to be so considered as in *Republica Platōnis*; and it is plain that some inconveniences arise, either with bad effects in the manner or circumstances of that election, or with law-suits, as in this case, by going out of the general rule, to create a particular benefit to the parish.

As to the election of Scott, that depends upon what was done at the two meetings: and on the best consideration I can give, I see no ground in law or equity to support his election. It may be unfortunate for this parish, when either of these, to whose character there is no objection, might have made a very proper minister. But the court must consider the question of right. It is admitted on all sides, that in point of law the presentation of Scott has been invalid; and the law is certainly so; and therefore a *quære impedit* brought on that foundation could not be maintained; all the trus-

tees being in point of law joint-tenants of this advowson: and then the ordinary is not compellable to accept the presentation; for he may refuse or accept it. This bill therefore is brought to supply the defect of that presentation in a court of equity, insisting that there is sufficient ground for that, and to compel the other trustees to join in the presentation. If the election is not good in point of law, it is incumbent on a court of equity to see that every thing was rightly transacted in that election. There may be a case in which an election might be in strictness of law regular, and yet such circumstances might be in it, as would not induce a court of equity to compel the other trustees to join in it; for whoever comes into a court of equity to supply legal defects, must come on equitable grounds, and shew every thing to be fair, which I do not see here. This brings it to the question whether here has been a sufficient valid election of *Scott*? What I ground myself upon is, that the decree requires not only a presentation, but election; which puts an end to what was insisted [415] upon, that this being but a presentation, if any one or two of the trustees had met and signed an instrument of presentation, they might have sent it about to the houses of the others: But the decree requires a previous election; in order to which there must be a meeting and assembly. It happened fortunately for the parish, that at the death of the last incumbent the number of trustees, which it was intended should be odd, was then equal: the duty of electors at meeting was to see and hear the proposal of any candidate that should offer; and to judge of their merits, and offer reasons as to their fitness. I consider what was done subsequent to the death of the trustee who voted for *Kirkshaw*, and the meeting on seventh of *August*, really and in fact as carrying on the former election; and several objections have been made to this meeting and this act.

As to the first objection, that the meeting was held after the four months; that I am of opinion is not sufficient; for though it is true there is such a direction in the decree, yet that is only directory; and if all the surviving trustees had met after the four months on a proper summons, it would be very good; and proper to be compared to the case of the *Borough of Landsdown* in *Roll. Abr.* which has been since held to be law, where the election was to be by a select number within eight days, and they did not meet till long after: it was held only directory, and that by their constitution they had a general power of electing. So here the trustees having the advowson in them, it was incident to that legal estate vested in them, it was not intended to take away that right; and the ground was in that case, that the words were affirmative and not negative.

The next objection is, that there was no approbation of assistant preachers, as required by the decree; but I am of opinion that is not an objection in this election. It is true, that it is a direction by consent in that decree: But it has not been observed for a long time; and plain that from the *Restoration* to this day there has been no regard to it. This was a trust, a right, a patronage, vested in them for benefit of the parish; not so as to create a devolution to the parishioners in general; for the sense of the decree was to avoid that. As this direction was for the benefit of the parish, and arose by consent, it may be laid aside by common consent: and the general disusage is an evidence of such consent to lay aside that part of the constitution as useless. It is to be compared therefore to the

case of a presumed by-law. Where in a corporation the election is vested in the corporation in general, on particular circumstances annexed, and afterwards that election vested in a select number, and those particular circumstances discontinued; the courts of law presume an ancient by-law to vary the constitution; the law allowing a presumed by-law in writing, which does not appear, in order to support it. So here will I presume a common consent of the trustees and parishioners to lay aside that custom, and will not throw that imputation upon all the elections made in this parish since that time, and on the several Archbishops who have inducted since, as being invalid and contrary to that trust; for that I must say, if I say this election is void for want of these assistants. And indeed very unnecessary was it to have them: nor does it appear to [416] have arisen from the opinion of Lord *Bacon*, but by common consent; and may be laid aside by consent, of which this long usage is evidence

The next objection is from the nature of the thing, that what was done then was no election; and it does not appear that it was; the evidence resulting only to be a meeting agreed to be had by these twelve, including their proxies, to confirm those votes given before, not to consider of new candidates, and to go to a fair regular election, but by taking advantage of the death of that trustee. And it has not the nature, quality or appearance of an election.

But supposing it had; the next objection is, that there was not sufficient notice of this meeting; to which two answers are given: that none was necessary; and next that if it was, there was sufficient. I am clearly of opinion, that in order to an election under this constitution and trust, notice of the meeting for election was necessary: from the nature of an election, which must be free, and at which all persons who have a right to appear ought to have an opportunity to be present, to effectuate the ends of it. It is so in all elections in corporate bodies, whether to be made by the corporation at large, or by select numbers: unless where an election is to be at a charter-day, fixing a particular day; for there every member is bound to take notice of that day. But if no charter-day notice must be given; and that, whether the persons who are to meet and act are all on a par, and of equal authority; or whether there is a presiding person or not. It must be given, either a special notice, or a general, established by usage; it is not material which; for if it is such an act as amounts to notice, it is sufficient. It cannot be said the major part of these twenty-four could have met where they please, and gone to an election, and bound the rest; the major part may meet indeed, and bind the whole; but not without notice, at any time or place; for the consequence then might be, that thirteen might meet, and seven of those thirteen would bind the whole twenty-four. But it is said, that by this decree, there is no direction concerning notice; no person whose particular duty is to give it; which is true: and [417] for that a case in *Carter* is cited. But it is not to be compared to the case of a condition, which stands on a different foundation; for wherever there is a condition in a will or settlement, it is a quality of the right, of which the person taking under it is bound to take notice. It is true that a case may be put in which they may differ; and some be for meeting at one time and place, and others at another. I think those

trustees who first give notice should take place; and it is hard to suppose their notice should be given at the same instant. It is properly compared to an arbitration: suppose a reference to five arbitrators; the major part of whom are to meet and determine; they may meet and bind the rest. Yet in that case all these objections arise; not having more authority to give notice than the other; the first notice should take place. But the law requires it should be given; and several cases have been before this court, where such an election for ministers, or for any other purpose, being vested in a number of trustees, it is always required. Next the evidence insisted on of a sufficient notice taken in its farthest extent, is not sufficient: the law presumes persons who meet to elect to act reasonably; and that the reasons and arguments offered by one would influence the others; therefore the not giving an opportunity to one to meet, avoids the election, as has been frequently determined. Other candidates might be proposed; which ought to have been taken into consideration; and the majority of the whole number might have agreed therein; for I am not to presume they all intend to adhere to their former opinion.

Another objection which deserves consideration, as I may be obliged to give some directions about it, is as to the proxies: first, that by law no proxy ought to be admitted to vote. Next, that if they ought, there was not a sufficient number to give *Scott* a majority, by making up the number twelve; for that one of the proxies vote was void, as the person who gave him a letter of attorney appeared himself. There is no evidence that proxies were admitted before in this election; but the trustees agreed among themselves to vote by proxy; and if it rested on that, and they had met regularly, they might, I doubt not, have made proxies to sign the presentation; for it is true that a trustee who has a legal estate vested in him, may make an attorney to do legal acts; and I should have been unwilling to avoid the election upon that head, if it had been in pursuance of that agreement; but it was not so. Here is a personal trust; the decree has directed the election should be by the trustees or the major part; if then the trust must be executed by the major part, which requires judgment, there is no instance, where a trustee is allowed to make a proxy to vote in a personal trust of this kind: the trustees were them-

[418] selves to judge of the qualifications of the candidates, and could not delegate that judgment to others, but ought to exercise it themselves. Then as to the next, I doubt whether that proxy did subsist to give a vote, and should have thought it was determined by the party's meeting, but it is not necessary to give an opinion about that. I think these proxies, so far from being the better for the name of the particular person for whom they are to vote being given, they are the worse for it; the trustee, who does so, determining himself without hearing his brother trustees. On these reasons the election of *Scott* is not to be supported: consequently that bill must be dismissed absolutely.

As to the information, that is not to be dismissed, whether what is prayed is properly prayed or not; for though the particular relief prayed is wrong, the information by the *Attorney-General* is not to be dismissed, if that charity wants any direction. Then it prays the establishing the popular election of *Kirkshaw*; which I cannot do, being contrary to the sense of Lord *Bacon's* decree; which is, that for the more orderly and peaceable election, it should be in this manner, the cure being great, and

the parish large; pointing out the reason of vesting the election in a particular number, and directing that the trust should be filled up; this institution being merely to avoid a presentation at large. Then a court of equity will not say that *cestui que trust* shall present, contrary to this trust; nor unless compelled to it by a plain absolute right, establish a popular election of a minister in this large parish; which is the worst way of nominating; and what all courts should avoid if possible: there is no ground, at least in a court of equity, to say there is a devolution upon the parish at large. My opinion then is to do what the trustees should have done; to direct the number of trustees to be filled up properly, and then to go to election; agreeable to the case of the *Attorney-General at the relation of Kinver parish in Staffordshire v. Foley* (1), in the *House of Lords*, in which I was of counsel. *Foley* had from the heir of the surviving trustee got a conveyance to himself of the term; the question was whether the advowson of the parish was not in trust for the parishioners? and it was so held by Sir *Joseph Jekyl*, and by Lord *Macclesfield* on a rehearing; the court taking it that by the extinction of the trust there was a devolution to the parish, and directed an election by the parishioners; which was had, as popular elections are, with great confusion. There was after that election an appeal to the *Lords*, December, 1, 1721; who reversed both decrees, and were of opinion, that though it was originally a trust for the parish, an absolute power was vested in the trustees of nominating such a minister as they or the major part should think fit, in order to avoid the inconveniences of a popular election: and would not suffer upon the notion of a resulting trust that those inconveniences should arise again; declaring that the surrender to *Foley* was a breach of [419] trust; and therefore, the old term being merged in the inheritance, a new term should be created, and vested in thirteen new trustees to be approved of by the court, who should go to the election of a minister. This was to avoid the inconveniences this parish is now running into: it was admitted throughout that it was a purchase by the parish by contribution, as it is in this; and though all the trustees were extinct, yet to preserve the intent, the *Lords* gave that direction. That was a very strong case, and a very reasonable and right one; and the reason of it falls in with this, though this is rather stronger, as the decree provides for the continuance of the trustees; which was not so there. The election of *Kirkshaw* therefore also is void, and the information, so far as it prays that, ought also to be dismissed.

As to the remaining regulations: first, as to the assistant preachers, I see no reason for them; next as to a direction for a subsequent election, I will direct two meetings of the trustees; the first to fill up the whole number to twenty-five, and to appoint a subsequent meeting, and give notice thereof in writing to all the trustees. If I make an order that the minister should read such notice after prayers, I cannot compel him to do it: hereafter therefore, for the more regular election, the trustee named first in such deed of trust shall, within fourteen days after avoidance, send such notice to every one of the rest.

In the argument for *Kirkshaw* was cited *Attorney-General v. Davy*, January 24, 1740 (2), where three persons being to choose a chap-

(1) 7 Bro. P. C. 249. octavo edit.

(2) 2 Atk. 212.

lain for *Sandford* near *Crediton*, the question was whether two could nominate without all concurring? and that his *Lordship* held in general the three should concur. But the usage might be different; that though it should come out, and the choice by two might be good on the foot of the usage; yet the third having a right to be present must have notice, which he did not appear to have had.

In the present case there was an appeal to the *House of Lords* from this decree, which was affirmed by consent. And *February* 18, 1750, it was moved to make the judgment of the *Lords* a standing order of this court.

Lord Chancellor said, it was necessary to do so, where the *Lords* vary or reverse a decree of this court, because it is to be carried into execution here: but he never knew it so drawn up when the decree was affirmed by consent, and desired the Register to see if he could find a precedent of that kind, and if so, to draw it up in that manner.

AVELYN v. WARD, *March* 19, 1749-50.

(Reg. Lib. 1749. A. fol. 286.)

Devise, on condition that the land should go over to another if he did not give a release in three months after testator's death, dying in the testator's life-time, the devisees over shall take instead of the heir at law. This being a conditional limitation, and not a strict condition (1). Specific legacies of stock, *et c contra*.

Argument on the other point, as to the legacies of stock, &c.

Legacies of stock are specific or general legacies according to the intent of testator from the will and the circumstances, whether he meant to confine it to the stock he then had.

SERGEANT URLING devised his real estate to his brother *Goddard Urling* and his heirs, on this express condition, that within three months after his decease, he should execute and deliver to his trustee, a general release in full words, of all demands which he might claim on his estate or any part, for what cause soever. But if his brother should neglect to give such release, the said devise to him should be null and void to all intents, and in such case he devised it to *Richard Ward* and his heirs and assigns for ever.

He gave some bequests to his sister; and in the end of the will there was a clause, that what was given to *Goddard Urling* and his sister should be taken in full satisfaction of the claims and demands which they or either of them could make on any part of his real or personal estate; and upon this express condition, that the sister and her husband and the brother, within three months after his decease, executed a general release of all manner of actions, causes of action, debts, claims, challenges and demands whatsoever, in law or in equity, against his trustee or his representatives, of, in, to, and out of his estate, real and personal.

(1) 3 Lev. 125. 2 Str. 1092. Fearn, 400. Douglas, 63. 1 Wils. 107. 3 Burr. 1624. Talb. 44. 3 Atk. 315. [and *Thellusson v. Woodford*, 4 Ves. 227.]

(1) See Mr. Vesey's note, (l) post, and *Thellusson v. Woodford*, 4 Ves. 227.

Goddard Urling the first devisee upon this condition, *who happened to be heir at law* (1), died in life of the testator.

For defendant *Richard Ward*. The testator by express words intended nothing should descend to the heir at law; and the estate never vesting in *Goddard*, the question, whether the limitation over can take effect? Which will depend on the distinction, if it is on a precedent limitation, which by what means soever being set out of the way, the limitation over may take effect: or upon a preceding condition or contingency; for then it cannot, unless that condition first happens or exist; as in devise of an estate if *A. goes to Rome*. That it meant the former, appears from the nature of the devise, as well as from general observations of the will: and in that case, if the precedent estate determines any other way, the limitation over always take effect; as in a limitation for life, remainder in tail to the first and every other son, remainder over: though the first son never came in *esse* the remainder takes effect. Suppose a gift to one for life, and after his death remainder over, if forfeiture, &c. determines it, it goes over: A gift to a Monk, and after his death over: it goes over immediately. So that it is immaterial whether determined on the event in view of the grantor, by death, or being void *ab initio*; nor is the order of the words of giving a precedent or subsequent limitation considered. In *Jones v. Westcomb* (2), Lord *Harcourt* [421] held the devise over good, though the first contingency never took effect. * The same will come in question again in *Andrews v. Fulham* (3), upon the term, June 20, 1738, in *B. R.* when *Lee, C. J.* delivered the opinion of the whole court, "that the limitation over to the sister was good, and that the devise to the infant being ineffectual was out of the case, and the law the same, whether the devise immediately preceding the limitation over was originally void, or became so by non-existence or non-entity of the person; for that since the law allows such a limitation over, it allows the waiting for it; that it was an executory limitation, which are all on some contingency on the failure of a preceding limitation, and none of them takes in all the ways of failing, yet it was the same thing. Nor was it necessary the devise to the sister should take effect immediately, and that the case of *Glascok v. Warren* in *Comberbach* was distinguishable from that case." But in *Fonnereau v. Fonnereau* (4) your Lordship said the record of that case could not be found; and therefore it is of suspicious authority. This being the determination upon the leasehold part of the estate, an ejectment was brought in *C. B.* on the real estate between *Roe v. Wickel*, where the opinion of *Willes, C. J.* and the rest of the court, except *Fortescue, J.* (who differed, but did not hear the argument) was, "That it might be either a limitation or a condition; but the question was, whether when an estate is devised on three contingencies, the devisee shall have it though none of them had happened; and this in disherison of an heir at law; another contingency having happened, that no child was born; as to

* Lord Chancellor said, that though the child's dying without issue is not mentioned in any of the printed books, the case was so.

(1) See post, 423.

(2) Prec. Ch. 316. and 1 Eq. Ab. 255.

(3) Vide 1 Wils. 107. and 3 Burr. 2624.

(4) 3 Atk. 315.

“which there was no direction in the will, which was *casus omissus*; and “the rule was, that an heir is not to be disinherited but by express words “or necessary implication: so that upon this ground the devise could not “take effect; that it was given over on a contingency not happening: and “that *Andrews v. Fulham*, being a determination upon the leasehold, was “distinguishable: the plaintiff there had assented to the devise over, and “therefore was concluded: and that there was a difference of construction between the leasehold and freehold, because of the favour shewn to “an heir at law.” The parties not being satisfied with this determination upon the freehold, by which it was distinguished out of the two former cases, another ejectment was brought between *Gulliver v. Wicket* in (1) *B. R. Mich. 19 G. 2.* when *Lee, C. J.* gave the opinion of the whole [422] “court, “That the consequent devise was to be considered as a “condition or contingency) which whatever way it was laid out of “the case, the other took effect.” A question like this came before your Lordship in *Fonnereau v. Fonnereau*: where the testator limited over in case of issue all dying, without putting the case of there being no issue at all: and though there was no issue, it was held the subsequent limitation should take effect. In *Lord Townsend v. Ashe* (2), *May 14, 1745*, two shares in the *New River Company* were settled on *Ashe* for 99 years if he so long lived, remainder to the children, remainder to *A. B. and C.* as *Ashe* should appoint, remainder over to uses under which the plaintiff claimed. These shares are real estate, and fines are levied of them: and though no appointment had been, the limitation over was held good.

For the heir at law it was insisted, that this was a strict condition; out of which *Richard Ward's* interest is to arise; and before any breach could happen, the estate must first vest in *Goddard Urling*, which would have been the whole fee; and therefore not like the cases where something particular is given before, as in a devise to a monk, or to *A.* for life; in which it depended on the antecedent estate; and whenever that determined it lets in the remaining interest, which arose out of the original devise.

LORD CHANCELLOR.

On this will the court is bound to make such a construction as to make good the plain intention of the testator, provided there are words in the will for it, or it can be done consistent with the rules of the court.

The question will very much turn on this; whether this devise over is to be considered, and the contingency on which it is given, as a strict condition or a conditional limitation (*k*): for if the former, it would be very difficult to maintain that the second devisee could have the estate but upon a strict breach or non-performance? If the condition had been performed, or it became impossible by act of God, that cannot be: but if it be a

(*k*) 2 Brown, 67. Ibid. 73. Sir *Lloyd Kenyon* said, there were many cases rendered impossible to be done, and yet the estate shall not vest.

(1) Vide 1 Wils. 105.

(2) 3 Atk. 336.

conditional limitation, the consideration is different* ; and I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation ; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place : and I am of opinion, this must be so construed. [423]

If it is a condition strictly, it is subsequent ; because the estate would vest *Goddard Urling*, and to be defeated by what might happen afterward. But that is not the construction in this case, and never is ; for if there is a devise to a stranger, not the heir as law, upon a condition subsequent ; the devisee over cannot take advantage of the breach ; for the benefit thereof is not deviseable, but must go in privy to the heir at law of the grantor, who must enter for the breach, not the devisee : though in some cases perhaps a court of equity might make the heir a trustee for the devisee. Therefore where an estate is devised paying a sum of money ; and if not paid, over to another : it is a conditional limitation to effectuate the devise, not a condition, according to *Co. Lit.* But this is a stronger, because the devise is to the heir at law ; who being the only person to take the advantage, and if he survives the testator, must be supposed to be in possession by the devise, must enter on himself : then how could this condition be made effectual according to law ? It will be construed therefore a conditional limitation : and it ought to take effect, notwithstanding the words *that if he gave not such release it should be null, &c.* If it is to be construed as a strict condition, what is insisted on for the plaintiff, that there must be a strict breach or forfeiture in fact agreeable to the words to make the subsequent estate take effect, would be the rule. But as it is a conditional limitation, it comes to the question whether it is necessary every particular fact should take place ; or whether it is not to be construed according to the sense and intention of the testator, that if in any event the first cannot take place, the subsequent should ; if so, the substance of this was the intent of the testator, that if no such release was executed, whereby the demand against his estate would exist, the estate should go over. And I think the determination of Lord *Harcourt*, and of the court of *B. R.* in the first case upon the term, that it was a good limitation though no child born, considering it the same as if the testator had said that if no issue should be of such child ; is in point : but more strongly the determination of *B. R.* in the last case upon the freehold. The cases put of a remainder on a particular estate are admitted : but it is said they differ from a conditional limitation, to introduce an executory or springing devise after a fee. I do not find any authority to warrant that distinction ; for *Jones v. Westcomb*, is a strong authority, that the construction ought to be the same, whether it is on a remainder so limited on an estate which never takes effect, or whether it is a contingent limitation after a fee ; for in that case it was so in respect of the freehold, notwithstanding the devise for life which was precedent to the limitation in fee to the child in his heirs, after which comes the limitation to the subsequent devisees. As that fee to the child stood before the limitation over to the persons claiming, the precedent estate for life did not alter the case ; because there was a complete disposition of the fee before the devise over, if the child

* *Douglas*, 487.

had been born (1). Therefore, with all deference to the contrary opinion of the court of *C. B. Jones v. Westcomb* is in point; concurring [424] with the resolution in *B. R.* especially the last, which has there the advantage, against that single resolution in *C. B.* and agreeing with the opinion given by me in (1) *Fonnereau v. Fonnereau*. But this case is stronger, from the clause expressly excluding the sister, now heir at law, in all events from taking any other benefit than what was given by the will: which is an injunction upon her to release every other claim, action, &c. and this is to be recovered by action.

The testator having also bequeathed some legacies of *South Sea Stock*; it was insisted they were not specific, but general legacies; consisting only in quantity, and must on a want of assets abate in proportion with pecuniary. He used no words applying it to the stock he then had; and if he had none at the time of making the will the executors must have bought it. In *Pierce v. Snaveling* [1 *Atk.* 414. cited ante, 256. and post, 2d Vol. 563.] *R. Roland* devised two legacies of £5000, in old *South Sea annuities*, and the residue to his nephew *Snaveling*; making *Pierce*, one of the legatees, sole executor; the testator at the time of making the will and at his death had but £5000; the residuary legatee insisted he was not bound to make good the deficiency, but that the stock of which the testator died possessed should be equally divided: the difficulty was whether it was a specific legacy: for then this £5000 stock alone could be applied, and none could be bought. Sir *Joseph Jekyl* held that the £5000 should be equally divided between the two legatees, because it was a specific legacy, and nothing more could be added to it, and because one would be defeated entirely. As in a devise to *A.* and his heirs, and in another part of the will the same estate to *B.* and his heirs, the better opinion is they should be joint-tenants. When it came before your Lordship you held it not a specific devise, but that each should have £5000 stock out of his estate; he not giving his *South Sea* stock he had at that time, but so much; there being a great difference in the civil law, where a thing is given by the name of *onus*: but the principal distinction was between a specific legacy, which is a gift of the thing the testator has, and a legacy of a *species* of things; which is the giving only so much of the sort of goods the testator has, and can be made good out of his estate by purchase; the other cannot. Therefore you directed £5000 stock should be bought, to enable the executor to make good both legacies; this is in point; the only difference being, in that case there was this natural objection, if to be considered as a specific legacy, viz. the absurdity in the testator's giving the thing he had not. But that was not the only nor the principal argument. Supposing the testator had sold any part, the executor must have purchased to make it up: and the testator might have had this in view, not to tie himself down from selling this stock; on the other side not to let the legatee suffer by having it liable; for if it was a specific legacy, the testator's selling out would have been an ademption (m). *Ashton v. Ashton*, Nov. 24, 1735, was cited in that case against the opinion your Lordship was of; Lord *Talbot* holding it a specific

(1) 3 *Atk.* 316.(m) 3 *P. Wms.* 386.

legacy, not in quantity only: but there appeared plainly the intent of the testator was so, from the words in the trust, *to sell as soon as may be* (1).

LORD CHANCELLOR.

In this case, notwithstanding (n) *Pierce v. Snaveling*, these are specific legacies. It is true I determined there contrary to the *Master of the Rolls* that they were to be considered as general legacies, consisting in quantity only, and not to be referred to the stock the testator was possessed of; it appearing he knew all the circumstances of his estate, and could not make a mistake in computation, nor intend to give £10,000 out of £5000 but plainly intending to give each legatee £5000, and therefore it should be made up out of the personal estate. * But I did not thereby determine that every legacy of stock or annuities must be considered not as specific, but general and consisting in quantity only (2). It is said the testator had not said in that case he gave so much of his *South Sea* annuities: which was a reason relied on in that determination, insisted upon at the bar, and taken notice of by me; I will repeat what I then said by way of caution. It was observed that the testator had not described the annuities by the word *my*, and did not intend to confine it; and though this observation was treated with little weight, and in many cases it is too slight to have weight, and I cited an authority in the civil law, which lays perhaps too much on the inserting *my* or *suus*, I went not upon that description or words being necessary; but that if it appeared by any hint that the testator intended to give out of that, it would confine it: where nothing of that sort appeared, it was to be considered as a general legacy. And I endeavoured to avoid making way of caution added, "I do not intend, nor lay it down as an invariable rule, that in all cases of devises of stock they are to be considered as general legacies; but always according to the will and the circumstances (o); and therefore if there is any thing shewing the testator intended to confine it to the stock he had at the time of his death it shall be so, and will turn it the other way, that the intent may be complied with: and for this I agree perfectly with the resolution of *Ashton v. Ashton* (p)." Consider therefore how the present case differs from *Pierce v. Snaveling*. Here the testator was possessed, at the making the will, of a sum in *South Sea* annuities equal to what he gives and more: and can the court construe him to intend that his executor should purchase out of the personal estate in general? It ought to be taken, that he intended to give it out of that he had: and to rely on the word *my* in laying too great a stress upon it. It is true that in *Ashton v. Ashton* there was another circumstance attending, of absurdity in supposing the testator meant a circuity: but it is equally ab- [426]
surd in the present case, to suppose that the testator did not in-

(n) 2 Vol. 561. 623. Cas. temp. Talb. 152, 1 Atk. 414. 503. In 2 Brown, 113, Lord *Thurlow* said, many cases are determined contrary to this, and are by Lord *Hardwicke* himself, *vis. Purse and Snavling*. But Lord *Hardwicke* seems to have well considered the circumstances, and did not mean to lay down an invariable rule.

* 1 Brown, 482.

(o) 2 Brown, 18.

(p) Talb. 152.

(1) *Ashton v. Ashton*, Forr, 152, and 3 P. Wms. 384.

(2) See 1 Roper on Legacies, 17, &c.

tend to give out of what he possessed, though he had to the value and more, but that the executors should purchase. But it is objected, that suppose the testator had sold out before his death, whether that would have made an ademption of the legacy, or whether it should be made good out of his general assets; for if specific, it would have been an ademption? There is no necessity to determine that; but the court has been loose in respect of ademptions of legacies by a disposition in the testator's life; and it was so held in *Partridge v. Partridge* (1), that if the testator gives part, and sells out, and before his death purchases other stock, this shall not be an ademption, but the other stock so purchased shall pass by the will: which, if compared to the cases of land, would not be so. That depends on the difference between real and personal estate: that the personal acquired at any time before the death of testator will pass by the will; but of land the testator must be seised at the time of making the will. But here the testator had more than to answer it; made no alteration: and intended therefore to give the quantity of stock out of that he was possessed of; which is a specific legacy, which shall not abate in proportion with the rest.

(1) Forr. 226.

PLUMMER v. MAY, *March 22, 1749-50.*

(Reg. Lib. 1749. B. fol. 250.)

A mere witness cannot be made a defendant for discovery of what he is examinable to; unless he is interested. If the bill charges he is interested, the defendant must plead and support it by an answer denying that allegation; and cannot demur (1). A party cannot examine his own witness upon a *voir dire* (2).

THE bill was brought by an heir at law, to discover the circumstances of the execution of a will against the subscribing witnesses; one of whom demurred to the bill.

LORD CHANCELLOR.

The principle is right, that you cannot make one a defendant to a bill who is merely a witness, in order to have a discovery of what he can say to the matter, though he is properly examinable as a witness: which would be very mischievous, and give an opportunity to collect evidence any way to contradict and encounter that; and if that was barely the present case, I should at once allow the demurrer. But as against a party interested, the plaintiff is entitled to have a discovery from him, if he is charged to be concerned in the fraud in obtaining it: and it is not his being made a witness, that will prevent this discovery.

But you seem to have mistaken your way, and should have pleaded instead of demurring; for here is an express charge that the defendants pre-

(1) See, however, *Fenton v. Hughes*, 7 Ves. 287; *et per* Lord Eldon, C. in that case, *ibid.* 289, 290. There is no further entry in Reg. Lib. than that the demurrer was overruled.

(2) See 7 Ves. 290.

tend to some right or (r) interest under the will. If you had pleaded to these matters, and supported that by an answer, denying the claim of any such interest, it had been a good plea. But a demurrer must be admitting every thing well charged to be true. You have en- [427] deavoured to support the demurrer by a disclaim by an answer: but a demurrer cannot be supported by an answer as to the matters demurred to; because that is bringing into it something said on the part of the defendant to support an allegation, that the charges in a bill are not sufficient; which is called a speaking demurrer.

There is sometimes a demurrer for want of parties, sometimes a plea. A demurrer where it appears on the face of the bill: but where it appears by way of averment, you must plead for want of parties: every thing necessary to support the demand in the bill must be taken to be true by the demurrer; and this charge in the bill, that he is a party interested, is necessary. As to the general danger from such a precedent there is no difficulty; for by the distinction before mentioned there is a plain way, if the truth of the case will bear it. Any witness may defend himself to such a bill, by pleading, and supporting it by an answer; which cannot be in a demurrer. This particular case does not appear under such circumstances that I will make any strain to allow such a demurrer, and shut out the plaintiff from having all the lights consistent with the rules of law and equity. I am of opinion, there is not sufficient ground on the face of the bill to allow the demurrer.

The only thing offered deserving an answer is, that this is such a matter that advantage might be taken of it by the plaintiff by examining him as a witness: that this amounts to an examination upon *voir dire*: and it is true, such an examination may be; which puts him to his own oath. But the plaintiff is not bound to examine on *voir dire*; and that question is asked *diverso intuitu*, to have another relief: for this charge in the bill is such, as if proved, may entitle the plaintiff to have a decree against him for an account, &c. But another answer is, an examination upon *voir dire* can only be where produced as a witness by the adverse party; for a man cannot examine on a *voir dire* his own witness produced by himself.

As it stands now therefore the demurrer must be over-ruled (1).

(r) Which is necessary for plaintiff to shew in defendant in a bill for a discovery merely. 2 Vern. 380. 2 Atk. 394. 3 P. Wms. 311.

(1) See Lord Eldon, C.'s observations on this case, 7 Ves. 289, 290; and note 1, ante.

STAPLETON v. CONWAY, *March 30, 1750.*

(Reg. Lib. 1749. B. fol. 584.)

Money charged on an estate in *Nevis* held to carry only *English interest* (1). This sum, which was charged in favour of *W.* held to be included in the bequest of a larger sum to *W.*'s younger children, the testatrix supposing that they were entitled to the charge, although it was not the case, and decreed that no more should be raised than the sum bequeathed. Plate passes under a bequest of "*household goods.*"

Interest sometimes given for the arrears of an annuity where frequent demand made.

A sum of £2000 being charged by settlement upon an estate in *Nevis*, the question was, what rate of interest it should bear (1).

It being insisted that where it was discretionary in the court, interest different from that of *England* may be given, and this being a sum of [428] money to be raised out of an estate, it must be considered as coming out of a fund in that island, and to bear the rate of interest there, viz. £10 per cent. for so much is the money worth there: and this not being a debt or loan, stood clear of any objection upon the statute of usury.

On the other side it was said, this was like a common legacy carrying common interest; suppose it was a legacy given in *England*, and the testator had charged it on an estate in *Nevis*, the court could not give £10 per cent. yet that is no debt.

LORD CHANCELLOR.

I am of opinion there is no ground to direct *West Indian* interest: where it has arisen by contract in *America*, by force of that contract, agreeable to the laws of those countries, the court has been obliged to follow it; but where it is a voluntary disposition by will or deed, and nothing said about interest, and the court is to act according to its discretion, it has never given higher than the legal interest in *England*, not even upon a mortgage made in *England* on an estate in the *West Indies*; as that would be a method to evade the statutes of *usury* in several instances. For if there is an estate in the plantations, out of which there could be good security, and the courts here should suffer a mortgage to be made at the interest money carries there, that method might be to avoid the statutes of *usury*; for the contract made in *England* would be as much against the statutes as any other contract against what the law allows. But this is not the question here, but being to act according to discretion, the court will direct interest at 5 per cent.

Another question was, whether interest should be given for arrears of an annuity.

Lord Chancellor said there had certainly been cases where that has been given; especially to a jointress for a long and obstinate delay of payment, and frequent demand of the money; but it not appearing here what demands were made for the money, he could not direct interest for it; the utmost was to reserve it till after the account taken.

(1) The sum was to be raised, together with all costs, &c. out of a term of three hundred years, for the benefit of Sir *W. S.* at twenty-one. There was no mention of interest in the trust. R. L.

VERNEY v. VERNEY, April 2, 1750.

(Reg. Lib. 1749. B. fol. 262.)

S. C. Amb. 88.—Leasehold interest.—Contribution and apportionment for renewal. The rule laid down by Lord *H.* in this case, as to a tenant for life contributing one kind does not now prevail. No contribution from an annuitant for life out of leasehold renewable interests. Revocation, by a codicil directing a sale or mortgage to pay debts, *merely pro tanto*.

(s) LADY VERNEY being tenant for life, and her son remainder-man in tail, under the will of *The late Master of the Rolls*; upon a petition, preferred merely for the direction of the court, a question [429] was made whether a proportion of the fine, upon the renewal of a leasehold estate in trust, should be paid by the tenant for life: for which was cited *Limbroso v. Francia*, where his Lordship directed tenant for life to bear one third of the fine.

On the other hand it was said that if this was adverse, the court would not compel her to pay any part of the fine: the testator having left this leasehold to the one for life, remainder to the other without saying any thing of the renewal, or any direction shewing an intention that this leasehold should be kept in the testator's family; and nothing in the will that shews the tenant for life should contribute as the lives dropped. If the tenant for life was one of the lives the court would certainly never compel it: for no renewal would then be an additional advantage. In the case cited, the court held the renewed lease must be subject to the former trust: but did not lay it down as a rule that should be the proportion, let the other lives be what they would.

LORD CHANCELLOR.

Whoever has such a lease for lives of a church or college (t), which is originally renewed, he always thinks, upon his settling or devising it, that he is settling a continuing interest, longer than the lives in that lease; and in that light the court considers it; and therefore considers all renewals arising out of that lease to be part of it and upon the same trust. First consider how this would be if it was a devise of the legal estate. If there is such a lease in which the life of the devisee or grantee for life is one of the lives upon which the lease is held, and it is a devise of the legal estate, that tenant for life will not be compelled to contribute to a renewal, because his interest is only for life, and that life is in the lease: the original interest given must be cotemporary and commensurate with the interest devised and settled; and consequently that tenant for life need not look out for a renewal, because it cannot be for their interest: so that having nothing to do with it, the fine and charges of renewal must be paid by the remainder-man. But the present is a devise to trustees, which I think differs in circumstances; for *cestuy que trust* can take nothing but in the consideration of this court; and the trustee has a power at law to enter on the estate, and may sell it. And yet in such case if *cestuy que trust* for life was one the lives, I should doubt whether such *cestuy que trust* could be compelled to contribute. But that is not the present case; all these lives being strangers to *cestuy que trust* for life; and therefore as all may die during the continuance of her estate and interest, she has a chance

(s) 1 Brown, 440.

(t) 2 P. Wms. 459.

for a benefit arising from this renewal; and so has her son only a chance; for if he should die without issue in life of the mother, he has no benefit of that lease. The intent of the testator certainly was, that the lease should continue and be kept on foot; and it must be so in some way: and what method is there, but by making all who have a chance for a benefit contribute? This question arises from the shortness of the penning the will, and the not providing for a renewal; which is often done in wills of leasehold estates held of a college or church, lest the college or church should take advantage of its being otherwise. Yet something must be done for a renewal though not mentioned. But there is a particular reason in this case for the court to direct a renewal, and that the mother and son should contribute, from the direction for payment of debts, for if it was necessary to apply this estate for payment of debts, in that case the lease must be renewed; which could not be out of the creditor's interest, who must be paid out of the testator's estate; nor out of the rents and profits, which would bring the whole burden on the tenant for life. It must be done in an equitable way, by a contribution of every one who is to take a chance in the benefit of the succession provided for by the will. The proportion must be by the mother's paying one-third of the fine and charges of renewal: the other to be paid out of the rents and profit of the son's estate: and that computation of tenant for life bearing one-third, the court has said, particularly Lord *Macclesfield*, to be a wrong rule, as being too low (1).

(1) See the former references. The cause was thus determined on consent. See R. L.

[EARL OF] PORTSMOUTH v. LORD EFFINGHAM, May 9, 1750.

Vide 2 *Strange*, 1267.

(Reg. Lib. 1749. A. fol. 658.)

See post, 2 Vol. 472, 476.—Bill of review on new matter. Question as to legal and equitable recoveries, and trustees to support contingent remainders.

JAMES Earl of *Suffolk* in 1687, made a settlement to the use of himself for life; remainder to his first and every other son; remainder to Earl *Henry* for ninety-nine years, if he so long lived; remainder to trustees to preserve contingent remainders; remainder to his first, &c. son; reversion to his right heirs.

Two recoveries were suffered by Earl *Henry* and his son in 1714 and 1721; but the trustees did not join therein. The plaintiffs claimed as heirs at law to Earl *James*; Lord *Effingham* under the recoveries. It was directed to be tried, and that upon a confirmation of the jointure of Lady *Suffolk* the deeds should be produced; which however was not done till after the hearing upon the equity reserved. A verdict was for the plaintiffs against the recoveries.

Lord *Effingham* now petitioned for a bill of review, upon new matter discovered since the decree upon the production of the deeds, viz. a discovery of two deeds, one in 1649, the other in 1654; with an affidavit that these deeds came to the petitioner's knowledge subsequent to the time of the

trial. The first was a conveyance by the same Earl *James*, creating, subject to portion; a contingent trust for himself in fee, if alive at the determination of the special trust; if not alive, a trust to [431] the heirs-male of his body: If none to the heirs-male of the body of a prior ancestor. The other deed in 1654, in which the trustees in the former deed joined with Earl *James*, was by bargain and sale for a particular trust, for the benefit of one of the daughters, who had one of the portions (the other being then dead) and then to the trustee's own use.

For the petitioner. The bill being brought by the heirs at law, suggesting that all the previous limitations were at an end, Lord *Effingham*, a stranger to the deeds, rested his title on the facts then discovered, the recoveries; as to the objection to which for want of the trustees joining, a court of law presumes every thing possible in support of common recoveries; as a good tenant to the *præcipe*, unless the contrary shew. 1 Vent. 257. 2 Lut. 1549. 2 Mod. Ca. *Webber v. Lord Montruth*, which was carried farther in a late case of Mr. *Greenvil* in B. R. where the jury presumed a surrender by a jointress to make a good tenant to the *præcipe*. In a case on the bill of *Elias Turner*, who had devised a large estate to a charity, there was a verdict in favour of the will; and upon a second information for a perpetual injunction to quiet the trustees for the charity, a final decree was made, and on application by Mr. *Montgomery* the heir at law, for another trial, it was refused; it happened that before the filing of the second information he had married the daughter of *Jacob Sawbridge*, and so discovered several letters written by the testator, and therefore begging not to be examined; who was notwithstanding examined on the trial, and the material witness, upon which the jury found their verdict. Though the intimation he received from his wife was sufficient to put him on the scent, yet as he had not the use of those letters at the trial, that was not thought an obstacle to his having the benefit of that new discovered evidence. But here the petitioner had not the least intimation before the time of the trial. Had this discovery been made, the plaintiffs could not have recovered in the ejectment; for at the time of the settlement in 1687, the legal estate was out of the Earl *James*. There was no necessity for the trustees joining, as appears from the deed in 1649; for the legal estate continuing in the trustees, Earl *James* by the settlement in 1687 conveyed nothing but a trust estate: and there is no occasion for trustees to support contingent remainders, where the settlement is merely of a trust estate; for though there are none, the original trust may be sufficient to support the inheritance; as held by your Lordship in *Hopkins v. Hopkins* (1), and *Chapman v. Blisset* (2), so that being an equitable estate, they are good equitable recoveries. The new matter therefore is relevant and material, and such as pro- [432] bably might have occasioned a different determination.

For plaintiffs. Two things are necessary for the petitioners; first that this is a new discovery, not only to himself, but to any agent of his, and the time he could have made use of it; for the knowledge of agents is as strong as that of the party: so held by the Lords in *Norris v. Le Neve* (3) Secondly, that this would be relevant, so that if brought into the cause, it would vary the decree: for a bill of review must be on error apparent

(1) Ante, 268-9, and 1 Atk. 581.

(2) Forr. 145.

(3) 3 Atk. 26. and 2 Bro. P. C. octavo edit.

in the body of the decree; or new matter, which could not be taken advantage of before. 1 *Chan. Ca.* 43. The petitioner had several opportunities of reading the deeds: which if not done, it was their own fault: and the verdict must be taken to be right, for no objection thereto can be a ground for a bill of review. But supposing this a new discovery, there is not sufficient probability that it will be relevant. If these two deeds had been produced, they could not have nonsuited the plaintiffs; they were made with a view to the troubles at that time, and notwithstanding them, the legal estate must be understood to be in the several parties claiming under the settlement in 1687. It cannot be supposed in the trustees; for a court of law or a jury will presume there was a conveyance of the legal estate to Earl James.

The trusts of the deed were all executed before 1687, upon the portions being paid: he might have got the estate by disseisin of the trustees, for it is an honest disseisin by *cestuy que trust* of his own trustees, for a particular purpose. These trustees could not have brought any kind of suit for recovery of the possession: could not maintain an ejectment even independant of the statute of limitations. So that after this length of time, the court will presume a reconveyance. In *Greenville's* case there was a double presumption; first of a surrender: next of a deed to make a tenant to the *præcipe*. *Vent.* 257. shews how strong presumption goes after length of time: for there the court presumed a licence, though absolutely necessary by an act of parliament.

* A mortgagee never in possession, has his interest paid him; his right is thereby considered as kept up for many years: if he enters into possession, and continues twenty years, the statute of limitations runs against the mortgagor at law and in equity. So of a trust if kept up, but the trustee never enters. It is otherwise where the trust is at an end, and not meant of the parties, for that no centre is fixed; without which it is impossible to make a circle: nor is it sufficiently described, whether it should be a circle with a radius of twelve miles or only a periphery of twelve miles.

to be kept up, and the preventing keeping up titles is the ground { 438 } of this presumption of their reconveying the estate, from their suffering others to enjoy it: and therefore in a fine conveyancers take no notice of trustees so remote: for how can the heir at law of a trustee who died so long ago be found? Here is time enough to bar a writ of right; and conveyancers never inquire into a title farther than sixty years. The acts of the parties are all upon a supposition that they were the legal owners ever since the settlement by Earl James, who also took himself to be so.

The authority of the cases of *Hopkins* and of *Chapman* must be admitted, that where a trust estate is created in fee, and limited for life, remainder to the first, &c. son, there is no occasion for trustees to support the contingent remainders; for if any gap, the original trust will be sufficient to support it. But that cannot be applied to the present case; which is not a question: whether trustees to support contingent remainders are necessary, but whether it is not necessary to make the trustees of

* Mr. *Wilbraham* said he had the book in which was entered in Lord *Harcourt's* own hand a note of a case of *Lewis v. Sir Thomas Willoughby, Mich. 4 Anne*, where the like presumption was allowed after forty-nine years.

the freehold trust, tenants to the *præcipe* in order to suffer a recovery. It is a rule, to which there are few exceptions, that a trust estate in the eye of this court, as to the rules of property, shall be considered exactly in the same light, as legal estates would be in a court of law; and the court is sorry to see an exception thereto. One there is in the case of *dower*; the reason of which is supposed to be, that it got into practice in too many cases before. But as to *tenant by curtesy*, your *Lordship* has established that the trust estate thereof should be just as of the legal estate (1). Then estates tail, and remainders of a trust estate, are barrable in the same way as of legal estates, upon the principle that equity follows the law: so that it is as necessary to have a tenant to the *præcipe* of a trust, as of a legal estate: if otherwise, a court of equity would suffer it to be barred by bargain and sale. Though it was formerly doubted, it is now settled that this court will not suffer tenant in tail of money to be laid out in land to bar it, but by a recovery. If there is a jointress of a trust estate, remainder to her son in tail, the court would not let the son suffer a recovery without the consent of the jointress: had the court been applied to before the recovery to have the trust executed according to the uses in 1687, the court would have directed trustees to preserve the contingent remainders to be inserted; then a recovery could not be suffered without making them parties: so must it be now it is *in fieri*; otherwise that tenant for ninety-nine years would have a better title to bar than if it had been executed.

LORD CHANCELLOR.

Suppose as things then stood, before the recovery, a bill had been brought for a conveyance of the legal estate. Earl Henry being tenant for ninety-nine years, if he so long lived: his son born, and so the contingent remainder vested; in decreeing that conveyance, would the court have decreed trustees to preserve contingent remainders to be inserted?

[434]

For plaintiffs. According to the nature of this, it would have been ordered; the intent being to support all the remainders over, and not only the next immediate. *Lawton v. Lawton*, 2 Will. 379. *Winnington v. Winnington*, and *Tipping v. Pigot*, Eq. Ab. are all authorities that these trustees are inserted that it should not be in the power of the tenant for ninety-nine years, and the remainder-man, his son, to bar it (2).

LORD CHANCELLOR.

I cannot say but that I am in some sort of doubt in my own mind what is proper to do. But considering this application is within a reasonable compass of time, but a year and a half after the final decree, and that upon a title, on which the right to this estate has never been considered either in law or equity; it would be too hard, provided the petitioner has brought himself reasonably within the rules of the court, to refuse it. I should be sorry if the consequence of it should occasion much more ex-

(1) See *Cashburne v. Inglis*, 1 Atk. 603. and Rep. temp. Hardwicke, 399. Also *Hearle v. Greenbank*, ante, 298.

(2) See 10 Ves. 278. et ante, 254, 546.

pence in this family : but if it does, that is not a reason why the court should cut matters short, and prevent the bringing the right to the proper method of being considered, which has not yet been tried. As to what passed at the trial, I do not know that they could bring a bill of review : for if not satisfied with it, they should apply to this court for a new trial : which upon conference with the judge, might have been directed.

There are two points, which are always proper to be attended to on such a petition. First, whether it is shewn that this new matter, upon which such a bill is sought, has come materially and substantially to the knowledge of the party or his agents, which is the same thing (u), since the time of the decree of the former cause, or since such time as he could have used it to his benefit and advantage in the former cause? Secondly, whether or no there is probable cause made, that new matter may be relevant to it.

As to the first, I think it is sufficiently made out to my satisfaction : and if in a case of this sort, relating to an estate in a great family, where there are a vast number of deeds relating to the title of that estate, the court should hold by a stricter rule, it may be attended with great inconvenience. And I shall the less choose to go by a strict rule, because the parties, particularly the plaintiffs and the defendant *Lady Suffolk* have not pursued the direction in the decree, and the intent thereof, [Vide ante, 30: 32.]; but posted on this cause to a trial without it. That intent and direction was, that the jointure should be confirmed before the deeds were produced, and consequently before the cause should be tried ; [435] for it must by the decree be ascertained by affidavit, which has not been done, but the plaintiffs lay by, not executing the deed of confirmation ; which she was so complaisant as not to insist on. But an affidavit is produced, importing in itself an admission by *Lord Effingham*, that there was some inspection of some deeds at least. But then it is positively sworn by him and his two solicitors, that until a considerable time afterward they had not notice or apprehension that any such deeds were in being as these mentioned. And though the affidavit is liable to some exception and cavil, I will not refuse a bill to review upon nice exceptions thereto. Then this is answered only by information and belief ; for her solicitor has made no affidavit that there was such an inspection as was desired ; nor can I compel him, or examine him *viva voce*. But taking it together with that information and belief : and suppose in such a noble family, and so many deeds, which all want to be turned over to see what they are, agents, not very fully informed, happen to pass over particular deeds that may be material to the title ; if that should be construed such presumptive notice to the client, against his being let in to have the benefit of his title, it would be fatal. In the case of *Jacobson*, a bill of review was allowed by *Lord Harcourt*, upon letters and writings that were in the custody of the party praying it ; yet it was granted on the foundation of its being looked upon as an old box, containing immaterial writings. Considering therefore all the circumstances, the affidavit standing unanswered, otherwise than by information ; there is a ground for it (1).

(u) 2 Vol. 576.

Which brings it to the merits: as to which it is impossible to say with certainty these are clear points; which is a sufficient ground to grant it; for if a bill of review is applied for upon a new matter changing the title, it is just it should be brought, and let the party have the benefit of it at his peril. It is therefore sufficient, if a probable cause of relevancy. First consider it upon the legal title. Supposing there was such a title standing out against Earl *James* when he made the settlement under which the plaintiffs claim, this is certain, that upon this question concerning the title, it has never yet been tried; for it was tried on a supposition that the legal estate was in Earl *James*. Neither of these deeds then appeared: they are of different natures; and that in 1654 is upon the face of it to the trustees own use. I do say this, as believing this was the intent of the parties: but speak only now as to the frame of the deed. As to what is insisted on either side, consider how the deed in 1654 operates in a court of law. It is thirty-three years between that and the settlement in 1687, that is no very great length of time to induce such a presumption. I agree that if it should appear in a court of law that there never was such a possession in the trustees, and that Earl *James* did alone (which probably was the case) continue in possession, and did acts of ownership throughout, that may be strong evidence to induce the court to believe it, or that he had disseised his trustees; but [436] I am not to say that here. It is to be tried by a jury, who are to judge whether there is ground to make such a presumption; and it would be going a great way to say that all the circumstances of the disseisin, &c. should be laid before a court of equity. They are to be left to a jury; who take the liberty to judge one way or the other, as these circumstances lead: and there is no certain rule; for they often presume one way or the other: and it would be making the court take upon itself the office of a jury. There is a very great length of time from the deed in 1654 to the recovery in 1714; will the court presume a reconveyance to the uses of that settlement? If Earl *Henry* disseised the trustees, he would gain an estate in fee: for he cannot disseise to gain a particular estate. This is not giving an opinion upon this; but to shew under what uncertainty I am pressed to refuse this bill, where it is impossible to infer what a court of law and a jury would infer.

This is supposing the legal estate in the trustees in the deed in 1645. Next as to the equitable estate. The plaintiffs insist the recovery is void for want of good tenant to the *præcipe*. The general rule is, that equity is to follow the same rule the law does, as to the limitation of legal estates, though not so as to enable a person owner of the particular estate to destroy the subsequent limitation by wrong (1). Nor do I know that the courts of law have gone so far as to presume trustees to preserve contingent remainders were made tenants to the *præcipe* in breach of their trust. It is said that as in a case of a legal estate, such a recovery would not be good, because no owner of the freehold joined; therefore if of an equitable estate, it would not be good. No particular case has been cited where that has been determined: and in a question of this kind, even upon that, it is hard to refuse a bill of review. But to consider the reason upon which it is supported; because the court strictly follows the rule of a recovery in legal estates, and considers the trustees as sufficient trustees

(1) See 10 Ves. 278. and post, 524, 546.

to support the remainder : it is true in *Hopkins v. Hopkins*, I was of opinion, that where a person seised of the legal estate made a settlement to trustees and their heirs, and all the subsequent limitations were declarations of the trust, that the trustees so appointed by the same deed would be sufficient to support it. That came not before Lord *Talbot* ; but it appeared in *Popham v. Bamfield*, 1 P. Wms. to have been the opinion of *Trevor*, C. J. in *Penhay v. Hurrell*. But this is different ; for here it is not by the same deed : certainly, where there is a tenant for life in jointure, the court would not let the son suffer a recovery, because there would be a plain freehold standing out. But the point is here, these trustees in the settlement in 1687, on a supposition Earl *James* had only a trust estate, had no estate either in law or equity in them. At the making the settle-
 [437] ment they were trustees, supposing them trustees at all, for Earl *James* and his heirs : even after making that settlement, and declaring the trust, these trustees interposed between the estate for ninety-nine years to Earl *Henry* and the remainder to his son, could take nothing either in law or equity : in law nothing, because the grantor in the deed had no legal estate in him : in equity nothing, because not intended to take an equitable interest : but only to support contingent remainders. It will deserve to be considered, upon what trust the new trustees in the deed of 1654, were to be trustees ; and whether they can be trustees to support contingent remainders, of which trust they had no notice at all ; or whether they will not be trustees in such a manner as that Earl *Henry* himself had the equitable freehold in him at the time of the recovery ? This is not an opinion : but it may be so argued. These therefore are new questions, for which there is no authority ; and it is hard, when the petitioner comes within so short a compass of time, to deny the having it considered in a regular legal way. It is clearly a new case, of a title at law never yet tried ; and a point of equity before the court never considered in this cause, and never in *specie* in other causes.

On the whole therefore, I am of opinion, the petitioner should be at liberty to bring a bill of review, to reverse or alter the decree upon the new matter alledged.

POTTER v. POTTER, *Rolls, May 7, 1750.*

(Reg. Lib. 1749. B. fol. 547.)

Vide S. C. 3 Atk. 719, and Amb. 98, upon other points.—Lands agreed to be purchased, pass by general words in a will, such as, “or elsewhere.” Republication by a codicil (1).

THE plaintiffs were *Thomas Potter*, second son and devisee in the will of the late Archbishop of *Canterbury*, and the other younger children and grandchildren of the testator ; the defendants were *John Potter*, eldest son and heir, the executors, some annuitants under the will, and *Isaac Hughes*, with whom the testator had contracted for the purchase of a large real estate : on the circumstances attending which treaty carried on in the testator's life, and on his will and codicils, the questions arose.

The case on the pleadings and proofs was this.

The testator, seized in fee of some manors and Lordships, and possessed

(1) See post, 485. *Gibson v. Lord Montfort.*

of a large personal estate, 12 *August* 1745, duly made his last will in presence of three witnesses; devising, subject to an annuity, his three manors of *A. B. and C. and all his messuages, lands, tenements and hereditaments, in the county of Bedford or elsewhere* in any part of *England* to the use of *Thomas Potter* for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail-male; remainder in same manner to his eldest son *John Potter*, &c. remainder to the daughters of the testator and grand-daughter as tenants in common, not as joint-tenants, then some [438] specific and pecuniary legacies: and all the rest and residue in trust, that so much of the personal estate as at the time of his decease should not be placed out in any public fund, should be invested in *South Sea* or other public funds; and, as soon as a convenient purchase could be had, all the stock should be disposed of therein, and settled in the same way.

By a codicil on the back of the will he afterward gave additional legacies and annuities charged and payable in the same manner as the annuity in the will, and ratifying and confirming the will, dated 10th *April*, 1747, and attested by three witnesses in these words, "This will with the several additions and alterations above was signed, sealed, and republished, by the testator as his last will and testament in presence of us the subscribing witnesses."

He afterward made another codicil on a separate paper; which though not dated, was agreed to be about four or five days before his death, in presence of three witnesses: reciting, that having in his will appointed several limitations and remainders of his estate, some of which were not agreeable to his present intent, he revokes so much as shall be found inconsistent with that codicil; ratifying and confirming the other parts which shall not interfere therewith: the attestation of which paper is, "Signed, sealed, published and declared by the testator as a codicil to the last will and testament."

October 10, 1747, he died, leaving this will and codicils, since proved and admitted by the defendant, heir at law, to be all duly executed so as to pass the real estate to the devisee to those uses.

The main question was, whether the contract for the lands, treated for in the testator's life to be purchased had at any and what time so far proceeded as to vest an equitable title in the testator, though no conveyance was executed of the legal estate; the circumstances of which were these:—

In 1743, there was a treaty between *Brown*, as agent for *Isaac Hughes*, and the plaintiff and *Westly*, as agents for the testator, for that purchase. The plan and particulars of the estate were delivered to *Westly*; and *June* 7, 1744, the parties met, a price was fixed, and agreed by parol, that the purchase should be completed the *Christmas* following. In *July* 1744 the title deeds were delivered to *Westly* to abstract and deliver to the testator's counsel; which was done *April* 1745. Further proceeding was interrupted by the claim of *William Huxley* to part of this estate. A bill was filed, and referred to the Master to inquire into this contract: who reported in *February* 1746, that it was a beneficial [439] contract, and the next day *Westly* received directions from the testator to draw conveyances; which he did by preparing a lease and re-

lease to make testator tenant of the freehold and inheritance for suffering a recovery to use of testator and his heirs, and a deed of bargain and sale, which was approved on behalf of testator. September 17, 1747, they were carried to testator, who returned them to be ingrossed: and they were actually ingrossed in his life, but by his death were not executed as was intended. The other intermediate occurrences were, that the agreement for the price being in 1744, application was made not to fell any wood that winter, because the estate was contracted for, and the purchase would be completed; that as to *Huxley's* claim, plaintiff offered to advance money to complete the agreement, and gave a note, that whereas *Brown*, vendor's agent, agreed to pay £1200 to *Huxley* for conveyance of his title, plaintiff agreed to pay £190 part thereof, if *Brown* should assign the said title to such person as plaintiff should appoint: that plaintiff went down frequently, and let the estate as he pleased, because it was looked on as contracted for.

The bill was to have on account of the personal estate, and this contract carried into execution, and the residue of the personal estate so applied, and the estate contracted for conveyed to the several uses in the will and codicils.

The defendant contended for the validity of the contract; but insisted the lands would not pass by the will: the testator having no title to them before the will, because no writing between the parties; and there being no republication of the will, the general words thereof would not reach this estate to the disherison of an heir at law; who is favoured in equity so as not to be disinherited by doubtful, but by express words, and clear intent: not even by clear intent without express words: which holds at law, but stronger in this court; and holds both as to the person to take, and the estate itself. It was strange, the testator should not make particular mention of this estate any where, or shew an intent to pass it, if he intended it; but he could not intend by that general sweeping clause to pass a greater estate than what he had before particularly enumerated. The statute of wills speaks only of such estates as the testator had at that time; indeed an agreement, though not in writing, yet if admitted between vendor and vendee, will be out of the statute of frauds; so where there are other circumstances, as the party's paying the money, the court will carry it into execution. But there is no authority, where there is a waiver of the first agreement, and a new one gone into, that a court of equity has said, the new shall have relation to the original agreement in order to disinherit an heir at law, which is this case: for the time of giving the note was the *era* of the valid contract to bind the parties. Al-

though where the thing agreed on is to be carried into execution [440] by several subsequent acts, as the former is the foundation of the whole, the court will say, there shall be a relation to make it good; this is not such a subsequent act as is necessary to carry the former into execution. Then as to the codicil, which may indeed be such republication of a will, that lands purchased after date of the will, if the words of the will are in general enough, will pass thereby, but it must be a codicil shewing necessarily such an intent: otherwise the annexing the codicil and confirming the will, will not do. In 1 *Roll. Ab.* 618. and 2 *Vern.* 722, *Hutton v. Simpson*, are instances, where though testator plainly shewed an intent his will should stand, by the act he did, yet it was not

a republication. The last codicil cannot be a republication; because not by way of indorsement or annexed to the will, or shewn that the will itself was at that time before the testator. It is determined in this court, that the very will itself must be re executed; and therefore this may be a good codicil, and yet no republication of the will. In *Litton v. Lady Falkland*, as cited in *Acherly v. Vernon, Comyns*, 383, (where it is much better reported than in 2 *Vern.* 621.) a codicil in a separate paper was not a republication of the will. In *Martin v. Savage* (1), *Mich.* 14 G. 2, the testator declared, his will was in custody of *Savage*, and that it was, and would be still his will: the point was, whether this declaration, which was subsequent to a settlement by fine, which had revoked the will by altering the estate, was a republication of the will? Lord *Hardwicke* Lord Chancellor held, the parol evidence should not be admitted, as it would elude the statute of frauds; and that though a codicil has been held a republication, yet never, except the will has been before the testator.

Plaintiff insisted, that even at making the will, testator must be considered in equity as intitled to this estate, and that it passed by the general words: but if not, he was so before the codicils; each of which was a republication, and to be taken as a concomitant, not a separate act. The statute of *H. 8.* means, that testator should be seised, if possible, but not of an estate in equity, which is impossible. He did not intend to die intestate; and it was prudent to leave it under such general words. The contract was complete; the subsequent matter, as the ingrossing, &c. being not considered as part; and the contract itself is different from the execution. Republication of wills are favoured (so said in *Vern.*) that a man may not die intestate; which is not favoured. *Martin v. Savage* was only this; a husband had declared the uses of a fine levied by him and his wife, the uses of which revoked the will; he afterwards declared the will should stand.

Sir JOHN STRANGE, *Master of the Rolls*, having taken [441]
time to consider, now gave his decree.

The question arises on the general words after enumeration of the particular estates, on which it seems to be admitted (and if not, I should have no doubt) that they will carry any other estate, he could be intitled to in law or equity at the time of the devise; for which, if it was necessary to cite authorities, there is 2 *Vern.* 679. *P. C.* 320, *Eq. Ab.* 211; which leads to the main question between the devisees and heir at law as to the contract. The vendor submits to the carrying it into execution; and both parties contend for it but with different views. (x) On the best consideration I am of opinion, that this estate, so contracted for in life of testator, must be considered in equity as his estate, and well devised to the uses in the will and codicils. As to the argument for defendant from being heir at law, &c. it is plain, that testator intended to die intestate, as to every part of his estate real and personal, and continued in that mind. What was his reason for so dealing with his son and heir this court has nothing to do with. Here is a clear intent and express words; and it is

(x) 1 *Atk.* 572. 2 *P. Wms.* 634.

not pretended, that testator had any other lands, to which these general wards could be applied, having particularised those estates of which he was seised. His not mentioning these lands may be accounted for : by the will he had disposed of all he had ; what would be at his death, was uncertain ; and therefore he used general words, that if completed it might pass by the will ; and inserted the clause to lay it out in land, if not done before. To consider the instruments : though there is no occasion to rest this on the will itself, yet I strongly incline to think, that even were the codicils out of the case, the will itself would pass the estate. One circumstance indeed is wanting, the reducing this agreement into writing according to the statute of frauds ; which if done in *June 1744*, no doubt but this estate must be considered as his in equity from that time. But though an agreement is not reduced into writing and signed by the party, yet it is well known, that if confessed, or in part carried into execution, it will be binding on the parties, and carried into further execution as such in equity (y) ; and here is the fullest admission thereof. It must therefore be decreed according to the case in *Eq. Ab.* 19. and the constant doctrine in this court : it will be the same, where vendor comes for specific performance, and the agreement admitted. No doubt, but on such admission it will be considered as an agreement from the time of transaction ; so that on a bill by either party, the court must have decreed execution, the estate as testator's from *June 1744*, and the money the vendor's. As to any partial execution before the will, it is so far carried into execution, as to

supply the want of writing on that head. Plaintiff was agent [442] to his father, who approved of the agreement ; it would be such a carrying into execution on their parts, as would have intitled vendor to have gone on with the purchase : but if that was doubtful, it is admitted for defendant, that the time of giving the note, when *Huxley* agreed to join with vendor in making a title, was the effectual time from whence it was his estate in equity : and if the first codicil is a republication, the new purchased estate will pass thereby. But I cannot consider the taking that note, &c. as waving the first agreement, and coming into a new one ; but rather a further step to carrying the original into execution, as removing an unforeseen obstacle, and with a view of proceeding with the contract. But could the defendant lay all previous steps to that transaction out of the case, yet if this codicil is a republication, he must admit, the estate will pass : and I am of opinion, this codicil amounts to a republication (1).

It answers their own idea of republication ; being indorsed on the will, and attested as the statute requires. The word *republished* is used ; which puts it out of doubt ; but if not, it would have amounted to a republication, as operating by additional charge on the real estate, and then concluding by ratifying and confirming the will. In all cases of republication no precise form of words is necessary ; but any, denoting the continuance of testator's mind, so far as he makes no alteration, will do. 1 *Roll. Ab.* 617, Z. 1. These words therefore *or elsewhere*, &c. must be construed

(y) Ante, 297.

(1) See 3 Woodd, 366. and *Pigott v Waller*, 7 Ves. 98.

to take in all lands, to which he had a title in law or equity, wherever in *England*; and the heir at law does not dispute, but that before 10 April, 1747, this was in equity testator's estate. The next instrument relied on for the plaintiff is the codicil made a few days before his death. The steps taken before the first codicil, brought the transaction, to the drawing the conveyances, &c. which were actually ingrossed, and would have been executed but for his death. The defendant is forced to admit that if that codicil could be a republication, the new purchased lands pass: and I am of opinion it amounts thereto notwithstanding the objections. It is an express declaration, that the rest of his intent, not inconsistent therewith, should continue and be confirmed: it might be mischievous to construe, that no republication could be but by the testator's taking the will in his hands, and republishing that by indorsement on it, or annexing the codicil to the will itself.

The law in favour of the power of devising has dispensed with many forms of expression, which would be absolutely necessary in other instruments; and will infer republication from an act done; as in 1 *Roll. Ab.* 617; the person intending to republish may be at a distance from the will itself; or may not have it in his power by its being in another's custody, and might know the substance, though he cannot repeat the particulars. When the codicil in *Litton v. Lady Falkland*, reported at large in 3 *C. Rep.* and this are compared together, there is ground to hold one a republication, though the other not. The codicil there was only an addition of some pecuniary legacies, and therefore [443] not intended to operate on or affect the lands; but here the whole purport of the last is to vary the limitations in some particulars, ratifying the will in all the rest: in 2 *Vern.* 625, no notice is taken of that objection in *Comyns*, of the not annexing the codicil; and this is the ground of that determination in 1 *Roll. Ab.* 618. In *Acherly v. Vernon, Comyns*, 381. the codicil was not endorsed or annexed to the will, and there as here, was an alteration and ratifying the will in all other respects. It was objected there, that it was on a separate paper, &c. but Lord *Maclesfield* held, the testator's signing and publishing the codicil in the presence of three was a republication of the will, and both together made but one instrument: so that the after purchased lands passed by the general words, although made by distinct instruments: and that is the later case, and confirmed in the *House of Lords*. In *Litton v. Lady Falkland*, though the codicil had been annexed to the will, yet I should think it not a republication as to the lands. *Hutton v. Simpson*, 2 *Vern.* 722 shews, that republication depends on the subject matter, not the annexing. (z) This last codicil was therefore a republication, and passed the estate under the general words of the will, if it had not passed before, as I think it had;

(s) 2 P. Wms. 334. Cro. Eliz. 493. 3 Atk. 180. Douglas, 69. Cowp. 158. 3 Brown, Parl. Cas. 101. 1 Vol. 492. In 2 *Vern.* 625, it was held that a codicil concerning the personality, is not a republication so as to pass lands purchased after the making of the will; and in 2 Vol. 626, it was held, that a codicil directing a will to stand, will not extend to a lapsed or a deemed legacy: and in *Proc. Chan.* 441, a codicil was held no republication of the will, but these were determined on the circumstances of each case, and the intention not sufficiently appearing.

and all three instruments must be taken together, and make but one will (1).

(1) And so declared in R. L.

SAMPSON v. BRAG[G]INGTON, *Rolls*, May 15 [31st,] 1750.

(Reg. Lib. 1749. B. fol. 373.)

A ship pledged abroad by the master for expenses, &c. well hypothecated, and the part-owners liable.

A MASTER of a ship having pledged the ship for the expenses, &c. laid out upon her abroad, the question was, whether the part-owners were thereby liable; the defendants insisting that, this being a contract abroad, by the civil law, or as received here among merchants, the master has no right farther than to hypothecate the ship, not to make his owners liable.

Against which it was said, that a captain of a ship has a power to charge his owners personally, as if it was money borrowed by the owners, in the same manner as where a debt contracted by a servant will charge the master personally: which personal obligation is not gone by, or inconsistent with, the pledging the ship. *Thomas v. Terry*, *Eq. Ab.* 139. *Speering v. Degrave*, 2 *Vern.* 643. and this is on a contract, laid out for the purposes of the ship, and for benefit of the owners.

Sir John Strange, *Master of the Rolls*, said, that case in *Vern.* seemed to be a transaction at home: and it was common, that if materials were furnished by tradesmen, they might bring an action against either. All the civil law says, is only on the general power of the master to hypothecate the ship, and make use of it as a fund or credit in a place, where [444] no other could be had. (a) But there is no case, where the master of the ship being abroad takes up money for necessities, whether that can personally charge the owners, or whether the whole lien is on the ship. The power of hypothecating has nothing to do with, nor is it by virtue of the common law, but from necessity and the law of nations. In general to say, the master cannot bind the owners by any act, is going too far.

His Honour took time to consider it; and afterward, (as I was informed) determined, that the ship was well hypothecated, and that the part-owners were liable.

(a) *Ante*, 154, and the cases there cited.

PENN v. LORD BALTIMORE, May 15, 1750.

(Reg. Lib. 1749. B. fol. 439.)

Specific performance decreed of articles executed in *England* concerning boundaries of two provinces in *America* (1).

Agreement to settle disputes (2). Process on a decree for possession of lands (3).

Decrees in *specie* preferable to damages at law.

Jurisdiction of the court though submitted to by answering, yet if a want of it appears at hearing, no decree.

Original jurisdiction as to bounds of proprietary governments in *K.* in council. But by the contract of parties brought within this jurisdiction.

K. in council cannot decree an agreement; not acting in *personam*, as this court can.

Proprietors of these governments may settle bounds between themselves.

If part aliened the tenure and services would remain on the whole, and exacted from either.

Tenure of the planters preserved by the agreement; they need not be parties.

Agreement not decreed without consideration. Settling bounds a mutual consideration.

Lapse of time in agreements relieved.

This agreement not like an award.

Not necessary to resort to the original rights.

Former computations of latitude vary from the present.

The title to convey. Agreements to be decreed entirely. Estoppel.

Agreement decreed, though it could not be enforced in *rem*.

The primary decree in equity in *personam*.

THE bill was founded on articles, entered into between the plaintiffs and defendant 10 May 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent granted 20 June, 2 C. 1. by which the district, property, and government, of *Maryland* under certain restrictions is granted to defendant's ancestor his heirs and assigns: farther reciting charters or letters patent in 1681, by which the province of *Pennsylvania* is granted to Mr. *William Penn* and his heirs; and stating a title to the plaintiffs derived from *James Duke of York*, to the three lower countries by two feoffments, both bearing date 24 August 1682. The articles recite, that several controversies had been between the parties concerning the boundaries and limits of these two provinces and three lower counties, and make a particular provision for settling them by drawing part of a circle about the town of *Newcastle*, and a line to ascertain the boundaries between *Maryland* and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 December, 1733. There was beside a provision in the articles, that if there should be a want of a *Quorum* of commissioners meeting at any time, the party by default of whose commissioners, the articles could not be carried into execution, should forfeit the penalty of £5000 to the other party: and a provision for making conveyances of the several parts from one to the

(1) See in *Barclay v. Russell*, 3 Ves. 491, &c. and *Nabob of Arcot v. East India Company*, 1 Vesp. jun. 371, 2. 2 Ves. jun. 56.; and *Earl Derby v. Duke of Athol*, ante, 202.

(2) See *Cory v. Cory*, ante, 19. *Taylor v. Rochford*, post, 2 Vol. 284. *Stapilton v. Stapilton*, 1 Atk. 2. *Frank v. Frank*, 1 Ch. Ca. 85. *Cann v. Cann*, 1 P. Wms. 723, 727. *Pullen v. Ready*, 2 Atk. 599. *Garrison v. Battinson*, 1 Vern. 48.; and *Stockley v. Stockley*, 1 Ves. and B. 23. 30.

(3) Vide Post, 454.

other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles; what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the *Attorney-General* should be made a party; who now left it to the
[445] court to make a decree, so as not to prejudice the right of the crown.

The first objection for defendant was, that this court has not jurisdiction, nor ought to take recognizance of it; for that the jurisdiction is in the King and council.

Second objection, that if there is not an absolute defect of jurisdiction in this court, yet being a proprietary government and feudary seignior held of the crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries by their own act; for such agreement to settle boundaries and to convey in consequence, amounts to an alienation, which these lords proprietors cannot do: but supposing they may alien entirely, they cannot alien a parcel, as that is dismembering; for which there is a rule in the feudal books concerning *Feuda indivisibilia*.

Thirdly, this agreement ought not to be carried into execution by this court; as it affects the estates, rights and privileges of the planters, tenants and inhabitants within the district, and the tenure and law by which they live, without their consent.

Fourthly, supposing all this answered, yet this agreement is not proper to be established from the general nature and circumstances. First, as it is merely voluntary, and the court never decrees specially without a consideration. Secondly, as the time for performance is lapsed. Thirdly, that these articles are in nature of submission to arbitration, which cannot be supplied by interposition and act of this court. Fourthly, that defendant was imposed on or surprized in making this agreement. Fifthly, that if there was no imposition or fraud, defendant grossly mistook his original right; and under that mistake and ignorance, the articles were founded and framed. Sixthly, the agreement in some material parts is so uncertain, that it cannot be decreed with certainty according to the intent of the parties, for that no centre is fixed; without which it is impossible to make a circle: nor is it sufficiently described, whether it should be a circle with a radius of twelve miles or only a periphery of twelve miles. Seventhly, there is a covenant for mutual conveyances; whereas the plaintiffs have no estates in the lower counties, so as to make an effectual conveyance to defendant; and an agreement must be decreed entirely or not at all; on the plaintiff's own shewing the legal estate and property is in the crown: so that at most they have but an equitable right, in which

the crown is trustee; and then this court cannot decree a com-
[446] conveyance. In *Reeve v. Attorney-General*, 1741, lands were devised to a wife, and after her death to be sold, and the money to be divided among the plaintiffs; the testator died without heirs; so that the legal interest in the estate descended to the crown, but with a trust to be sold. On a bill to have the will established, and to hold against the crown, or the lands sold, *His Lordship* dismissed the bill; and said, where the crown

was trustee, the court has no jurisdiction to decree a conveyance: but they must go to a petition of right (1). Eighthly, this court cannot make an effectual decree in the cause, nor enforce the execution of their own judgment.

LORD CHANCELLOR.

I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labor and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a *Roman* senate rather than of a single judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a *Roman* senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence; which will fall in more naturally, and very intelligibly, under the particular points arising in the cause.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this court; the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in *specie*; and more useful in a case of this nature than in most others; because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, *viz.* the settling and fixing these boundaries in peace, to prevent the disorder and mischief, which in remote countries, distant from the seat of government, are most likely to happen, and most mischievous. Therefore the remedy prayed by a specific performance is more necessary here than in other cases: provided it is proper in other respects; and the relief sought must prevail, unless sufficient objections are shewn by defendant; who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered: and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering submits to the jurisdiction: much more when there is a proceeding to hearing on the merits, which would be conclusive at common law: yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears. It is certain, that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council; and it is rightly compared to the cases of the ancient *Commotes* and *Lordships Marches* in *Wales*; in which if a dispute is between private parties it must be tried in the *Commotes* or *Lorships*; but in those disputes, where neither had jurisdiction over the other it must be tried by the King and council; and the King is to judge, though he might be a party; this question often arising between the crown and one Lord-Proprietor of a province in *America*; so in the case of the *Marches* it must be determined in the King's court, who is never considered as partial in these cases; it being the judgment of his judges in *B. R.*

(1) See Mitford, 29.

and *Chancery*. So where before the King and council, the King is to judge, and is no more to be presumed partial in one case than the other. This court therefore has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in *England* under seal for mutual consideration; which gives jurisdiction to the King's courts both in law and equity, whatever be the subject matter. An action of covenant could be brought in *B. R.* or *C. B.* if either side committed a breach: so might there be for the £5000 penalty without going to the council. There are several cases, wherein collaterally, and by reason of the contract of the parties, matter out of the jurisdiction of the court originally will be brought within it. Suppose an order by the King and council in a cause, wherein the King and council had original jurisdiction; and the parties enter into an agreement under hand and seal for performance thereof: A bill must be in this court for a specific performance; and perhaps it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. The King in council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right: but if that agreement is disputed, it is impossible for the King in council to decree it as an agreement. That court cannot decree *in personam* in *England* unless in certain criminal matters; being restrained therefrom by stat. 16 *Car.* and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement; and being within the jurisdiction of this court (b), which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it. To go a step farther; as this court collaterally and in consequence of the agreement judges concerning matters not originally in its jurisdiction, it would de-

[448] cree a performance of articles of agreement to perform a sentence in the Ecclesiastical court just as a court of law would maintain an action for damages in breach of covenant.

As to the second objection: if it was so, it would be very unfortunate; for suits and controversies might be for that reason endless; and this has subsisted above seventy years. This objection is insisted on at the bar, and not by the answer. The subordinate proprietors may agree how they will hold their rights between themselves; and if a proper suit is before the King in council on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. In this respect also it is properly compared to the case of *Lordships Marches* and to counties *Palatine*. When the *Marches* subsisted, there might be a suit in *B. R.* concerning their boundaries; and the Lord of each *March* in question need be the only party. If a matter of equity arose, either of the *Lordships Marches* might have sued in equity to settled because this is the King's court of general jurisdiction as to matters of equity; and an agreement between the parties relative to these boundaries, if proper in other respects to carry it into a specific performance is a matter of equity. The court might indeed by reason of their

(b) 4 Inst. 213. Ante, 204. Post, 552.

tenure require the *Attorney-General* to be made a party, to know, if he had any thing to object; but then might hold plea of the cause. Suppose, both counties *Palatine* were in subjects hands (as both have been formerly), and subsisted so; and a question had arisen concerning the boundaries of these two counties *Palatine*; and the respective Earls *Palatine* had entered into articles concerning these boundaries; this court would have held plea of such articles as well as concerning the boundaries of manors, seigniories, and honours; for these are honours, only a franchise of a higher nature. To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion, (which cannot be presumed) the boundaries so settled are to be presumed to be the true and ancient limits. But suppose it savours in some degree of an alienation, why ought it not to be? There is no occasion to determine that, nor will I; but it is a new notion, that the Lords proprietors of these provinces may not alien to natural-born subjects. This is no opinion: but the grants themselves are framed so as to be most open to alienation; being grants to them and their heirs to be held in common *socage*; not in *capite* of the crown, but as *Windsor Castle* is. What rule of law is there, that lands or a fran- [449] chise granted to be held in common *socage*, nor in *capite*, but as of a particular honour or manor, cannot be aliened without licence? All the objections concerning *knight's service* or *capite* lands are out of the case, and the act 7 and 8 *Will. 3. Cap. 22. Sect. 16.* supposes the proprietors may alien to a natural-born subject. The first words of the clause there are, that they and their assigns may be restrained from alienating without licence, which supposes that it was assigned; and this appears in the case of *Carolina*. As to the not alienating a parcel, the rule cited out of the *Feudist* is not applicable; those books treating of different tenures: but I admit, neither of these proprietors could dismember their provinces, so as to alter the nature of the thing granted, and thereby bind the crown of whom they held; for the tenure and services would still remain on the whole, and the crown might demand the whole services from either. It is therefore something like the case of the office of high constable of *England*, held by the tenure of *grand serjeanty*: which was very extraordinary, to hold the manors by tenure of such an office. [1 *Inst.* 106. 149. 165.] In *Kel.* 170. and *Dy.* 215. the judges reported their opinion to *K. H. 8.* that the tenure was not extinct by the division, but that the King had a right to insist on the performance of that office from the Duke of *Buckingham* by reason of his moiety: but this exacting the performance of the service from either subject is at the King's pleasure to do or not. This is an instance that in honours and tenures of this kind, the King cannot be prejudiced by any alienation, division or severance between the parties; and if material services are reserved on the grant (though here it is by fealty only in lieu of all) the entire services might be exacted from either, not being apportionable. But the settling limits is not a dismembering; and if a licence to do this was necessary from the crown in law and policy, it sufficiently appears there was such; for it appears by orders of council made in 1685 and 1700, the crown has not only recommended, but ordered, this division to be made so far as respects the three lower counties; as to which there is no dismembering; for the dividing line is

thereby exactly the same: indeed the circle is not within these orders: but as to that no difficulty can arise.

As to the third objection: the tenure of the planters, &c. remain just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement; but if they could, care is taken by the agreement to preserve them. The King of England is still their sovereign and supreme Lord; both charters require, the law of the respective provinces should be conformable to the law of *England*, as near as could be. Consider, to what this objection goes; in lower instances, in the case of manors and honours in *England*, which have different customs and by-laws frequently; yet though different, the boundaries of these manors may be settled in suits between the lords of these manors without making the tenants parties: or may be settled by agreement, which this court will decree without making the tenants parties; though in case of fraud, collusion or prejudice to the tenants, they will not be bound: but notwithstanding it is binding on the parties, and to be established as to them. Suppose, two bordering manors had been granted out in tail in recompence of services, the reversion in fee to the crown: in a suit between the lords concerning the boundaries, it is not necessary to make the King or tenants parties to this suit. Indeed the crown would not be bound by that agreement or decree: but it is still binding between the parties. But in this case the same final answer occurs, that does under the other objection; viz. that if there is no fraud or collusion, it must be [450] presumed to be the true limits being made between parties in an adversary interest; each concerned to preserve his own limits, and no pecuniary or other compensation pretended. And (abstracted from the general question of want of jurisdiction) suppose either party insisted, there was such a breach of the *proviso* here, as incurred the penalty, and brought *Debt* in *B. R.* for that penalty, and the defendant there brought a bill here to be relieved (which probably would have been done:) the court must have relieved against the penalty on performance of the articles; judging on the terms of the relief, and dispensing with the point of time, the court could not have avoided it. Then how does this case differ? For it will not be pretended, the King in council would have had plea in that case: it must have come into the King's courts of equity, which must have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumstances of the agreement.

First it is true, the court never decrees specifically without a consideration: but this is not without consideration; for though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet (1), is a mutual consideration on each side; and in all cases make a consideration to support a suit in this court for performance of the agreement for settling the boundaries.

The objection of the time for performance being lapsed may be answered; for it is the business of this court to relieve against lapse of time in

(1) So settling disputes, though it afterwards appear that one of the parties had no title, where no fraud. *Stapilton v. Stapilton*, 1 Atk. 2. *Frank v. Frank*, 1 Ch. Ca. 85. *Cann v. Cann*, 1 P. W. 723. 727. *Pullen v. Ready*, 2 Atk. 592. *Goilman v. Battison*, 1 Vern. 48. *Cory v. Cory*, ante, 19. See 2 Vol. 224.

performance of an agreement (2); and especially where the non-performance has not arisen by default of the party seeking to have a specific performance; as it plainly does not here.

Next, these articles are not like submission to arbitration. In these cases generally the time is conditional, so as determination be made by such a day; here the line and circle are agreed on by distinct, independent, covenants, and that they shall form the boundaries of these tracts of land; this therefore is a particular, certain, specific contract of the parties, that these shall be the boundaries; nothing left to the judgment of the commissioners, who are merely ministerial to run the line, &c. according to the agreement, and set the marks. Therefore it is not like an award, but is an agreement, which this court will see pursued.

As to any imposition or surprise, the evidence is clearly contrary thereto. It would be unnecessary to enter into the par- [451] ticulars of that evidence; but it appears, the agreement was originally proposed by defendant himself: he himself produced the map or plan afterward annexed to the articles (c): he himself reduced the heads of it into writing, and was very well assisted in making it: and farther that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, viz. the defect of evidence on the part of the defendant, which amounts to stronger negative evidence, than if it was by witnesses; for it was in his own power to have shewn it if otherwise. Then am I to presume, he was imposed on, in a plan too sent to himself by his own agents: as to the plan itself, it was in his own power; with regard to the original of these minutes of the agreement wrote by himself, though ordered by the court to be produced, they are not produced; which negative evidence supports the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

I admit, that, though no imposition or fraud, yet a plain mistake contrary to the intent would be a ground not to decree specific performance. But consider the evidence thereof: the defendant and his ancestors were conversant in this dispute about fifty years before this agreement was entered into, and had all opportunities; therefore no ignorance, want of information or mistake, are to be presumed: and in cases of this kind after an agreement, and plain mistake contrary to intent of parties not shewn, it is not necessary for the court to resort to the original right of the parties: it is sufficient, if doubtful. To consider the points in dispute, and first upon the defendant's charter; in which it is insisted, the whole 40th degree of *North* latitude is included; and if so, that it is not to be limited by any recital in the preamble. There is great foundation to say, the computations of latitude at the time of the grant vary much from what they are at present; and that they were set much lower anciently than what

(c) Ante, 19. 2 Vol. 46. 284.

(2) Though courts of equity will relieve against lapse of time in various cases, as in *Vernon v. Stephens*, 2 P. W. 66. *Pincke v. Curtis*, 4 Bro. 329. *Fordyce v. Ford*, *ibid.* 494. *Lloyd v. Collett*, *ibid.* 469; and 4 Ves. jun. 689, 690. note; and *Gregson v. Riddle*, cited 7 Ves. 268.; yet they by no means consider lapse of time as wholly immaterial, *Gibson v. Paterson*, 1 Atk. 12. is therefore mis-reported, vide 4 Bro. 497, and *ibid.* 471, note. 4 Ves. 690. note. See *Seton v. Slade*, 7 Ves. 285.

they are now; as appears by Mr. *Smith's* book, which is of reputation: but I do not rely on that; for the fact is certainly so. But whatever that was, does it take in by the description? It comes to the question, whether the *usque ad* is inclusive or exclusive; therefore however described, the same question remains. But there is another argument used by the plaintiffs to restrain the defendant's charter from taking in the whole 40th degree, viz. the recital of it, for the plaintiffs say, the information, given to the crown by Lord *Baltimore*, was, that this part was land uncultivated and possessed by barbarians: whereas it was not so, but possessed by *Dutch* and *Swedes*; and therefore the King was deceived in his grant. There is considerable evidence, that *Dutch* and *Swedes* were settled on the *East* part of that country; but this is said to be no deceit

[452] on the crown; for though some stragglers were settled there, yet if not recognised by the crown, that is not a settlement. I am of a different opinion; for in these countries it has been always taken, that that *European* country, which has first set up marks of possession, has gained the right, though not formed into a regular colony; and that is very reasonable on the arguments on which they proceeded. Then will not that affect the grant? If the fact was so, that would be as great deceit on the crown in notion at law, as any other matter arising from the information of the party; because such grants tend to involve this crown in wars and disputes with other nations; nor can there be a greater deceit than a misrepresentation tending to such a consequence; which would be a ground to repeal the letters patent by a *scire facias*.

Next consider the dispute on *Penn's* charter, which grants to him all that tract of land in *America* from twelve miles distance from *Newcastle*, to the 43d degree of *North* latitude, &c. under which the plaintiffs do not pretend a title to the three lower counties, which relate to the two feoffments in 1682. Upon the charter it is clear by the proof, that the true situation of *Cape Henlopen* is as it is marked in the plan, and not where *Cape Cornelius* is as the defendant insists: which would leave out great part of what was intended to be included in the grant: and there is strong evidence of seisin and possession by *Penn* of that spot of *Cape Henlopen*, and all acts of ownership. But the result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries of these countries and rights of the parties doubtful. *Senex*, who was a good geographer, says, that the degrees of latitude cannot be computed with the exactness of two or three miles; and another geographer says, that with the best instruments it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles; which is near the whole extent between the capes. It is therefore doubtful; and the most proper case for an argument, which being entered into, the parties could not resort back to the original rights between them; for if so, no agreements can stand; whereas an agreement, entered into fairly and without surprise, ought to be encouraged by a court of justice.

The objection of uncertainty arises principally on the question concerning the circle of twelve miles to be drawn about *Newcastle*, it was insisted on in the answer, and greatly relied on in *America*; but is the clearest part of the cause. As to the centre, it is said, that *Newcastle* is a long town, and therefore it not being fixed by the articles, it is impossible that the court can decree it; but there is no difficulty in it: the centre of a

circle must be a mathematical point (otherwise it is indefinite) and no town can be so. I take all these sort of expressions and such agreements to imply a negative: to be a circle at such a distance from *Newcastle*, and in no part to be further. Then it must be no further distant from any part of *Newcastle*. Thus to fix a centre, the middle of *Newcastle*, as near as can be computed must be found; and a circle described round that town; which is the fairest way; for otherwise, it might be fourteen miles in some parts of it, if it is a long town. Then what must be the extent of the circle? It is given up at the bar, though not in the answer. It cannot be twelve miles distant from *Newcastle* unless it has a semi-diameter of twelve miles: but there is one argument decisive [453] without entering into nice mathematical questions; the line to be the dividing line, and to be drawn *North* from *Henlopen*, was either to be a tangent or intersecting from that circle, and if the *Radius* was to be of two miles only it would neither touch or intersect it, but go wide. There is no difference as to the place or running of the line from *South* to *North*, though there is at the cape, from which it is to commence.

As to the seventh head of this objection, it is truly said, that agreements must be decreed entire, or not at all. As to the plaintiff's estate and possession, this must concern only the three lower counties, which plainly passed by the feoffment. I will lay aside the question of *Estoppel*; which is a nice consideration; for the Duke of *York*, being then in nature of a common person, was in a condition to be estopped by a proper instrument. In 1683, the Duke of *York* takes a new grant from the crown; and, having granted before, was bound to make further assurance, for the improvements made by *Penn* were a foundation to support a bill in equity for further assurance. The Duke of *York* therefore while a subject was to be considered as a trustee; why not afterward as a royal trustee? I will not decree that in this court: nor is it necessary: but it is a notion established in the courts of revenue by modern decisions, that the King may be a royal trustee; and if the person, from whom the King takes by descent, was a trustee, there may be grounds in equity to support that; and if King *J. 2.* after coming to the crown was a royal trustee, his successors take the legal estate under the same equity; and it is sufficient for plaintiffs if they have an equitable estate. Then consider this in point of possession of the *Penns*; the proof of which is very clear: they have been permitted to appoint governors of these lower counties; which have been approved by the crown according to the statute of King *William*. Indeed all the acts of possession are with *salvo jure* to the crown; but the evidence for defendants amount to this: not of real possession or enjoyment, but of attempts to take possession sometimes by force, sometimes by inciting people to come there, otherwise why should Lord *Baltimore* grant here for half what he granted in other places? which shews plainly it was an invitation to get settlers under their title. Now I am of opinion, that full and actual possession is sufficient title to maintain a suit for settling boundaries: a strict title is never entered into in cases of this kind; neither ought it. But what ends this point of want of title to convey is, that no part of the lower counties is left to be conveyed by plaintiffs to defendant; so that nothing being to pass by plaintiffs it is not material whether they have title to convey or not. But now in cases of this kind, of two great territories held of the crown, I will say once for

all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidence of title to lands, or district of lands in *America*, that can be; and so have I thought in all cases since I have served the crown; for the great beneficial advantages, arising to the crown for settling, &c. is, that the navigation and the commerce of this country is thereby improved. Those persons therefore, who make these settlements, ought to be protected in the possession, so far as law and equity can: and both these proprietors appear to have great merit with regard to the crown and the public; for these two provinces have been improved in private families to a great degree to the advantage of their mother country: this regards the three lower counties; the strength of which is vastly on the side of the plaintiffs.

As to the court's not enforcing the execution of their judgment, if they could not at all, I agree, it would be in vain to make a decree; and that the court cannot enforce their own decree *in rem*, in the present case: but that is not an objection against making a decree in the cause; for the strict primary decree in this court as a court of equity is (*d*) *in personam*, long before it was settled, whether this court could issue to put into possession in a suit of lands in *England*; which was first begun and settled in the time of *James I.* but ever since done by injunction or writ of assistance to the sheriff (1): but the court cannot to this day as to lands in *Ireland* or the plantations. In Lord King's time in the case of *Richardson v. Hamilton, Attorney-General of Pennsylvania*, which was a suit of land and a house in the town of *Philadelphia*, the court made a decree, though it could not be enforced *in rem*. In the case of Lord Anglesey of land lying in *Ireland*, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem*, but the party being in *England*, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of the court. And indeed in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks by the order in 1735, as if that was in view; liberty being thereby given to that board.

This opens a way to that part of the case relating to the crown. The *Attorney-General* acts a very impartial part; and I shall express in the fullest words, that this decree is entirely without prejudice to any prerogative right or interest in the crown. I will go further; that as I do not know

how far that interest of the crown may be, I will reserve liberty for either party to apply to this court, if any act or right of the crown, execution of this shall be obstructed; for the court is at liberty to suspend its decree, if a difficulty to perform it is shewn: and I will reserve further directions as between the parties as to that matter so *de novo* arising. Judgments have been at law with a *salvo jure* of the crown; as in *Rastal* and *Coke's* entries in the title of *intrusion* and *quo Warranto*; which particularly in the cases of lands relating to intrusion, is very analogous to the present.

(d) 4th Inst. 213. Ante, 204, 447.

(1) After service of a writ of execution of a decree for delivery of possession of lands, the court will grant an injunction on a motion of course; and the writ of assistance to the sheriff is founded on it. See in *Huguenin v. Basely*, 15 Ves. 180.

I am of opinion therefore to decree a specific performance of this agreement without prejudice to any right, &c. of the crown.

Next as to the point of costs; for which must be considered, what passed in *America* and in *England*. As to what passed antecedent to granting the commission, it is very fair on both sides; all the objection arising from that, is the defence against the performance; and that there are no grounds for the defence from fraud, imposition or mistake, which are made the heads for it. But in *America* the defendant's commissioners behaved with great chicane in the point they insisted on, as the want of a centre of a circle, and the extent of that circle, viz. whether a diameter of two or of twelve miles; the endeavouring to take advantage of one of plaintiffs commissioners coming too late, to make the plaintiffs incur the penalty. It is plain from the articles, both sides should be answerable for default of their commissioners; the penalty shews the intent; though I own, this is not that case; but I do not go on that. The defendant has been misled by his commissioners and agents in *America*, to make their objections his defence: which brings it nearer to himself; and though he would not at all have thought of it as from himself (so that I impute nothing in the least dishonourable to him), yet I must take it as his own act; and then should not do complete justice, if I did not give plaintiffs the costs of this suit to this time, to be taxed, reserving subsequent costs.

His Lordship, having directed that the plaintiffs and defendant should quietly hold according to the articles, altered that; for it would be improper to have a decree in this court for quiet enjoyment of lands in *America*; which would occasion continual applications to this court for contempts, &c. and that it ought to be the proper jurisdiction.

Mr. Solicitor-General in his argument cited the *Massachusetts Bay* company, against the *King*, in 1746, in the council, as to settling boundaries; where on petition by the plaintiffs to rehear, the committee reported, that there was no instance of rehearing on an appeal; [456] which would be mischievous, unless on some very particular circumstances, as new discovery or fraud concealed; and therefore the petition was rejected.

WEST v. SKIP, May 16, 1750.

(Reg. Lib. 1749. B. fol. 519.)

S. C. Ante, 239, and 245.—Partnership effects first applied to pay partnership debts. Judgment-creditor leaving the goods in bankrupt's hands, cannot come against another, who has taken execution.

This now came on upon the point reserved till after the determination of *Ryal v. Rowles*; *Ante*, 348. 375. and the question was whether there was any distinction between this and that case, either on the foot of the *Elegit*, taken out by the sisters of *Ralph Harwood* on a judgment confessed by him, against his lease of the brewhouse, &c. (which the sisters insisted, the commissioners of the bankrupt were not intitled to seize and sell under the act of parliament,) or on the foot of the officers of excise, whom the sisters had paid off, and insisted, that having paid a debt to the crown, the prerogative of the crown should avail them.

LORD CHANCELLOR.

The statutes of bankruptcy do certainly not extend to the right of the crown; but as to the partnership debts subsequent to the assignment, the sisters are considered as partners; and the partnership-effects must be applied to pay the partnership-debts, before any other partner can claim any thing out of either for his share or debt. Suppose a subsequent judgment-creditor had taken these effects in execution: it has been determined over and over at *Guildhall*, that one cannot come against these goods, which he had left in the bankrupt's hands, and say, he is a prior judgment-creditor. Then a question will be, whether any thing will be coming after payment of the partnership debts?

But first let the Master inquire, whether, at the time of the judgment confessed by *Ralph Harwood* to his sisters, any sum was due to them, or either of them? what was the consideration of the judgment; and if the master shall find any debt due, then take an account thereof.

BAKER v. PAINE, May 21, 1750.

Articles of agreement rectified by the minutes. Admission of parol evidence where fraud or surprise.

THE plaintiff, captain of an *India Ship* (e) by articles of agreement bargained and sold to defendant, all his *China* ware and merchandise, which he brought home in his last voyage; covenanting that he was the real proprietor and had a right to sell, and should allow, deduct or pay to defendant all the customs, duties, allowances and charges, that should be taken out of the said bargained premises. Those allowances amounted in the whole to forty-six and a half *per cent.* paid to the company on [457] the captain's private trade in respect of warehouse-room, &c. or of the duties to the crown. Two ships having been taken on return home, the goods happened to sell for a much higher price than they had agreed on. The captain brought this bill, for an account of what was due on this contract.

The material question was, whether the plaintiff ought to bear all deductions and allowances, that were to be made, to the extent only of that sum he was to receive on his private contract with defendant; or whether he was to bear it on the whole price the goods should sell for at the company's sale by inch of candle?

Plaintiff's counsel admitted, the articles, as penned, were against him so as to oblige him to pay on the whole sum, but the real contract and intent was, that he should pay the forty-six and a half *per cent.* only on the price he was to receive by his private contract with defendant, who should bear the deduction on the surplus price for which the goods sold, because that was all profit to himself; and it appeared by the minutes and the calculations made by themselves at the time, that this was contrary to the intent, and a mistake by the drawer: which is a head of relief in this court; and to this parol evidence was offered to be read.

Objected to for defendant; for by this means the mere allegation of

mistake will let in parol evidence in contradiction to any agreement, and defeat written acts. The presumption is, the whole agreement was comprised in that deed: therefore though the court leans against objections of this kind, which prevent information, yet this would contract the rule of evidence always adhered to unless there is fraud in the deed. The court will not add to the written agreement. In a case, *Mich.* 1746 (1), on an agreement about a lease, which the defendant agreed to let at so much clear of taxes: the defendant was an unlettered person who added his mark; the tenant drew it, but omitted to insert that clause, and brought a bill to carry it into execution: the defendant proved, that it was the intent it should be clear of taxes: but the court said, that if the bill had been brought by the defendant to carry into execution, the objection would be more material, as that would be to add to the agreement.

LORD CHANCELLOR.

How can a mistake in an agreement, be proved but by parol evidence (f)? It is not read to contradict the face of the agreement which the court would not allow, but to prove a mistake therein, which cannot otherwise be proved: it may therefore be read.

For plaintiff. It was then urged, that by such an agreement [458] as this, the more his goods sold for, the less he should receive; nay, they might sell at so high a price, that he should be money out of pocket; and parol evidence was read to shew the usage; viz. that the buyer usually paid all the charges on the surplus price, above what was contracted for. The defendant bid for the goods himself, and nodded to the auctioneer; and since offered plaintiff money by way of compromise.

For Defendant. Though by this agreement the more plaintiff's goods sold for, the less he would receive, he could not be out of pocket; for though the word *pay* was inserted in the articles, (which would indeed be a foundation for an action of covenant to compel payment of the whole deductions) it was by mistake of the drawer, for in the minutes it was only *deduct*, and equity would relieve. But this is a contract on a risk or chance on both parties; and its having fallen out in favour of defendant is no reason to vary the agreement, which must be taken as at the time unless fraud appears. If in all contingent contracts the risk must be equal, it would bring more business than the court could know what to do with: had a small advantage been gained, it would not be set aside, and the *quantum* will not vary it. Suppose a ship, insured at a great price is missing, had never sailed, but was safe in port all the time, so that the underwriter ran little risk: yet on a bill to have the *premium* returned on

(f) Parol evidence admitted to prove words taken down in writing were contrary to the concurrent intentions of all parties. 1 Brown, 341.

Where the agreement was not inserted in the deed as the transaction would appear usurious; parol evidence of this referred to contradict the deed, as the agreement was not charged to have been omitted by fraud. 1 Brown, 92.

(1) *Joynes v. Statham*, 3 Atk. 318; on which see the observations of Lord Rosslyn, and Lord Eldon. C. 4. Bro. 518. and 6 Ves. 325, note.

foot of mistake the court would not relieve. No fraud is proved: and little weight is to be laid on the offers to plaintiff

LORD CHANCELLOR.

It is impossible to say this case is free from obscurity: and every case of this kind will be attended with some. Plaintiff may be intitled to a decree for account; but it must be according to what was his real agreement. To be sure it is very extraordinary, that an agreement should be made for sale of goods, which goods must by law be sold at another public sale to ascertain the real price; and that the more the goods sold for, and the greater profit the buyer should make, the less the seller should receive for those goods. Such an agreement might indeed be made: but it is extraordinary; though it is not likely to happen, yet possibly the goods sell so high, that the seller might be obliged to pay money out of his pocket besides losing the whole price of the goods. It is admitted, there is a mistake, by drawing it so as that an action of covenant would lie: and then the question is, whether equity would relieve? But I do not think the drawer of the articles has pursued the intent of the minutes [459] in other parts besides the inserting the word *pay*. In the minutes it is not said, *that all shall be charged on the bargained premises*, which imports the goods sold, but *charges, &c. that may be taken out of the produce of the said china ware*: which is an ambiguous expression, not so determinate as the other; as it might refer to the account the parties made up themselves, which was to be regulated *de novo*; and this is a great variation in the words and sense. Then I am of opinion, these minutes must be taken to be the agreement of the parties; and if any material variation (as is admitted for defendant) the articles must be rectified. The question then is, what is the true sense of the minutes?

All contracts of this kind depend on the usage of trade, and are so allowed, not only in this but in common law courts. On mercantile contracts relating to insurances, &c. courts of law examine and hear witnesses, of what is the usage and understanding of merchants conversant therein: for they have a stile peculiar to themselves, which is short yet is understood by them, and must be the rule of construction. The material evidence to afford a rule from facts and usage would be to shew how the accounts had been made up, and the allowance made by the captain on one side, and the buyer or dealer in *china* on the other. And the plaintiff has proved by several witnesses; the amount of which is, that suppose the captain previous to the sale, agrees to sell part of his private trade for £100, on which all the charges amount to £50, the seller is to pay that £50, but if the sale should amount to £200, the buyer usually pays the advance: whereas the evidence on the part of defendant amounts to nothing in this case, not swearing to a question of fact, what allowances, or in what manner accounts are made up (which is material) but only to the form and expression of the contract.

As to the objection of the risk; it is truly said, in all contracts of risk, that is no reason to vary or put a different construction on the agreement; which must be taken at the time; but here that argument is not *ad idem*; for the risk in this case is not at all to be applied to the deductions or

allowances; which was a known and certain charge of 46 and a half per cent.

As to the subsequent misbehaviour of defendant, no intentional fraud is to be inferred; but it is sufficient for this purpose, that to make another construction would put it in the buyer's power to play such tricks; and it is not material to inquire, whether it was done or not. The offers by defendant are material, though generally speaking, offers by the parties by way of compromise are not to have much weight in the merits of the case, nor to be made use of, yet in cases of this kind, where the contract is doubtfully penned and to be explained by usage, those offers may have weight. But as to the risk of the two ships being taken, that I [460] suppose was a risk not considered by any party.

The minutes must be taken to be the agreement; the articles are not penned agreeably thereto; therefore the minutes ought to be expounded according to the usage of trade; which is proved to be, as plaintiff insists; defendant's evidence proving nothing of the fact.

ROOK v. WORTH, May 23, 1750.

(Reg. Lib. 1749. B. fol. 611.)

A sum of £96 paid to guardian of *infant tenant in tail* for rebuilding a copyhold tenement that had been burnt down, but which had never been so applied during the infant's life, held to belong to the succeeding remainder-man in tail, subject to a deduction of interest upon a larger sum at which the loss was computed. Such interest held to belong to the personal representatives as a compensation for the loss of the rents and profits sustained by the infant, who could not alien. Question as to *infant tenants in tail*.

Copyhold tenant subject to waste, unless by act of God.

And tenant for years, where burnt by fire, though no covenant to repair or rebuild.

A COPYHOLD estate intailed, consisting principally of a house, having been burnt down, the sum of £96 was collected on briefs toward the rebuilding, and paid by the trustees of the charity into the hands of the guardian of tenant in tail who was an infant, and died under age, without its having been so applied. A question arose between the personal representatives of the infant and his aunts, who claimed an issue in tail under the settlement of the real estate, in place of which this money came, and brought this bill for that purpose.

LORD CHANCELLOR.

This is certainly a new case; of which there is no precedent; yet in general there are authorities, the reason of which governs this.

I was at first a little alarmed by this bill; because what I generally go on, is to discharge bills relating to money given in this kind of charity collected on briefs; and if the money had been in the hands of the trustees, I would have dismissed the bill; and they should have come to this court by petition: but that is not the case, the money having been paid by the trustees, for the benefit of the person then taken to be the sufferer: so that it is in the hands of his guardian, and in the same state as if a particular sum had been raised or given by relations or friends of the infant, and

to come in lieu of that loss he sustained, and which would be so applied. It is admitted, the only loss sustained by the infant was from the burning down the house: had it been a loss complicated, partly consisting in the burning the house and destroying the goods and other property of the infant, it would have been very difficult to have made a division and distribution of the money: and I should have endeavoured to have avoided entering into that consideration; but that is not the case.

There are two principal grounds for plaintiffs: viz. that this was an estate tail of one dying during infancy (1); and that it was copyhold.

As to the first, supposing this had been the estate of one of [461] full age seised in fee; and the money had been paid by the trustees to tenant in fee himself, or to some one for his benefit: I should be of opinion, that on his death his heir at law could have no claim on that money; unless there was some act, declaration, or apparent circumstance, arising from himself to appropriate this money to rebuilding the house. So if he had been tenant in tail of full age who had spent or mixed the money with his other personal estate without appropriation to the purpose of rebuilding; I should have thought the issue in tail would have had no right to come to this court to have it so applied. Therefore it is rightly compared to the case of money paid on insurance of a house from fire: the insurance-money was a satisfaction for the loss; and if tenant in tail or in fee of full age had died, before the money was paid by the insurance offices, the heir at law or issue in tail would have a considerable right to come into this court to have the premises so destroyed, repaired or rebuilt, and that case of the insurance might be compared to cases, where tenant in fee enters into articles to build a house, and before it is built, the party dies: the court has decreed as between executor and heir at law the articles should be carried into execution, and the house rebuilt for the benefit of the heir at law; it partaking of the nature of the realty, [2 Vern. 322.] There may be cases, where tenant in tail or fee has done an act, for which he had a personal remedy only, as against the workman he had contracted with; that should be considered as so annexed to the realty, as that the heir at law should have the benefit of the contract. There is a case for that purpose in *Vern.* so would it be in the case of one of full age (g). But this is a case of infancy, which operates in this manner: he was under guardianship (h); and his estate ought to be taken care of, and applied according to the nature of it; and the court will always take care it shall be so, and will not suffer his real property to be changed into personal during his infancy, or his personal into real; in order that the persons, who are to come into succession, may find the property in the same state without being altered by those, who had not power to alter it: of which there are several cases with regard to the timber part of the inheritance, and with regard to money directed to be laid out in land, which the infant might have elected to be taken as money, if he lived to full age. Then on a bill in the infant's life by his *prochein amy* in his name,

(g) 3 P. Wms. 99. Prec. Chan. 319. 1 Atk. 480.

(h) Infant's inheritance not bound by act of the court. 2 Vol. 23.

(1) See *Ware v. Polhill*, 11 Ves. 257, 274.

the court would have compelled the guardian or trustee to have laid this money out in rebuilding the house; and would not have said, the money should be kept till he dies, and then it shall be mere money, and the heir at law shall take the premises without the application of the proper fund to put them in the condition they were. That right subsisting during his whole life, his death will not change it; but it will be bound by the same equity, and under the same right.

Then consider the next distinguishing reason, that this is copyhold; which greatly strengthens it. The copyhold tenant being subject to *waste* by the general rule of law, (no custom to the contrary being shewn) this might have been considered by the lord of the manor as waste; for, unless it is a burning by lightning or the act of God, the destruction of a house by fire, unless in convenient time repaired, is waste. So as between landlord and tenant for years, though no covenant to repair or rebuild, he is subject to *waste* in general, and if the house is burned by fire, he must rebuild. But this is stronger, for if there is any negli- [462] gence in the copyhold tenant or guardian, as this is the case of an infant, the lord of the manor would have this right; which therefore still subsists: and it would be fatal for the tenant in tail, if he should lose his estate for want of the application of this money. This distinguishes the present case: and if it had been a question between the heir at law and personal representative, the heir at law would have this right to have the money so applied, as it stood so bound at the death of the infant: so will the issue in tail.

The only doubt I have, is as to this part of the case: the whole of the loss the infant sustained, is computed at £148, the loss to him during his minority, as then he could not alien, was the loss of the profits of the estate, which must be considered as the loss of the interest of that money, and a personal loss to himself. Then will the issue in tail be intitled to have the whole laid out in rebuilding the premises? or ought not the infant tenant in tail to be allowed so much out of it, as the interest of the whole £148 would amount to during his life? it was agreed afterward that the plaintiffs should pay £80 as a reasonable proportion of the £96 to the rebuilding under the circumstances of the case; but without costs on either side. As the plaintiffs were tenants in tail of full age, the court would not decree them to lay it out; they might do as they thought fit.

GREEN v. RUTHERFORTH, May 23, 1750.

(Vide Reg. Lib. 1749. A. fol. 396.)

Lord HARDWICKE, LORD CHANCELLOR, Sir JOHN STRANGE,
Master of the Rolls.

Devise of a rectory to a college on trust (*inter alia*) to present the senior divine then fellow. Plea to jurisdiction, as being in the visitor, over-ruled.

Collegiate body compellable to execute a trust as a private person, and though the bill not brought recently.

THE end of the bill against the Master, Fellows, and Scholars of St.
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John's College in Cambridge, was to oblige *Dr. Rutherford* to deliver up a presentation made by the College of him to the rectory and parish church of *Barrow in Suffolk*, to restrain his having institution and induction thereon, and to present the plaintiff under their common seal; setting forth, that *Margaret Countess of Richmond*, mother of *King Henry 7th*, founded this College; that *Queen Elizabeth* in her twenty-second [463] year gave a new body of statutes to the College, which were accepted by them, and by which they have ever since been governed; that by uninterrupted usage of the College whenever a benefice became vacant, the senior Fellow on the divinity line was presented, whether he had taken the degree or not: that *Dr. John Bowton*, a Fellow, by will in 1689 devised to the Master, Fellows and Scholars of the College and their successors, the perpetual advowson of this rectory on trust, that whenever the church should be void, and his nephew should be capable to be presented thereto, they should present him, and on the next avoidance should present one of his name and kindred, if there should be any such capable thereof in the College: if no such, they should present the senior divine then Fellow of the College: and on his refusal, the next senior divine, and so downward; and if all refused, they should present any other person they should think fit; but that whatever Fellow accepted it, should be obliged to resign his fellowship and place in the College within one year. The last incumbent dying in *May 1749*, it was offered to the senior Fellow, and on his refusal to the next, till it came to the plaintiff's turn, as next senior on the divinity line, who offered to take it, and they were desired to present him: but the defendant insisted, that he, being doctor in divinity, was to be considered as the person described by testator, and interposed by appeal to the Bishop of *Ely* as visitor: on hearing which the Bishop was of opinion that *Dr. Rutherford* was within the description of the will, and therefore required them to present him; and that to avoid being censured, they made a special presentation under their common seal: but the plaintiff insisted, that as the advowson was devised to the College under particular trust by a third person, not the founder, the visitor had not jurisdiction to determine of the presentation, or to interpose in execution of the trust; and therefore prays, that presentation may be cancelled, and that the College may, be directed to present him as intitled under the trust of the will.

Dr. Rutherford put in a plea to the jurisdiction of this court; in which he states and set forth *verbatim* the will and statutes; the first of which was *de ambiguis et obscuris interpretandis*; wherein *Queen Elizabeth* reserves a power of adding, diminishing, charging, and disposing, inhibiting all others therefrom; and if the Bishop of *Ely* or any other should make new statutes, she absolves the College from obeying them on pain of perjury and amotion; and if any doubt should arise on her statutes, they should send to the Bishop of *Ely*, and submit to his decision on pain of amotion. The next statute set out was *de visitatore*; the next *de Collatione beneficiorum*, that on a vacancy of any benefice they should within a [464] month after confer the same *Socio secundum gradum suum maxime seniori qui nullum ecclesiasticum beneficium habet*. After which defendant says further, that he has heard and believes, the Bishop of *Ely* for the time being, and no other, has been of right visitor, and exercised all powers and jurisdiction over the Masters, Fellows and Scholars

of the College; and all other matters within the jurisdiction of a visitor, in as ample a manner as may be lawfully exercised; and that he, and no other court, has determined controversies about the construction of the statutes and right of presentation, whether given by the original foundress or subsequent benefactor. He then set forth the will of Dr. *Bowton*, who had been long a Fellow and well acquainted with the statutes; then states the facts of his presentation on his appeal; to which the Master, &c. had put in an answer; then avers, that the plaintiff never appealed to the visitor to hear his right or claim: that the Bishop has right to compel all the members to answer upon oath as to all matters touching presentation of a living, and to enforce the prosecution of all the statutes; and prays judgment, whether he ought to be compelled to answer plaintiff's bill, and whether this court ought to proceed further in the said suit.

For defendant. This is a plea in its nature to the jurisdiction of the court: that there is another judicature exclusively to take cognisance of matters of this kind, which has exercised its jurisdiction, and pronounced sentence in this cause; which is binding. That the Bishop of *Ely* is so appointed generally, appears by express words of the statutes, *visitationem illi commendamus*; and then the particular directions subsequent will not take away that general visitatorial power. It is a question of great consequence to both universities; affecting that power they in general are all subject to. As these eleemosynary foundations are subject to rules and orders of their own, some person ought to be superintendant to see their body of statutes, which is their *magna charta*, maintained; and that is the visitor; the reason of which is, that they might not be drawn from the College to *Westminster*, but have a speedy and final remedy. His power in general extends to matters relating to the College, its members or possessions; having solely a right to determine any controversy about the fellowships, as Lord *Hale* has settled; and consequently the incidents, as the emoluments, goods, and profits of the lands. Though an advowson may be considered as a trust, it would be fatal, if under that notion the courts at *Westminster* should draw advowson of Colleges to them; and as the founder might subject that as well as lands or goods, it is a proper object of the visitor and would certainly be so, if it belonged originally to the College: nor will its coming subsequent make it otherwise; the visitor and founder having a right to put subsequent benefactions under the statute or correction of the visitor: other- [465] wise it would be a great disturbance to College-possessions; for where one advowson has come to a College by original foundation, many more have come since; and all livings, given to a College or purchased subsequent to the first foundation, and by a private person, nay a bequest of goods or plate will thereby be excepted out of the visitor's power; whereas they should be considered part of the general property of the College, and rest on the same rules: nor is there an instance of an application to any other court, unless in a collateral question of donor's right to give. Being given as an emolument to a fellowship, no particular trust can take it out of that jurisdiction the Bishop has over the person and the thing, and the statute alone can determine, who is senior divine. There being various trusts in the will, in one of which the College is interested, it is no objection to the visitor's power, that the rest of the trust are such as a court of justice would have cognisance of. The pre-

ceding trust to the nephew, &c. are determined, on a will for establishment of the charity must have been considered as if they had never been in the will: so that over the intermediate trust among the members of the College the visitor must have jurisdiction; like a gift to the College for a particular estate, remainder over; the College would have an uncertain duration of the property, but it would be no objection to the visitor's jurisdiction, that a trust may happen, in which a person, no member may be interested; for in mean time it would be the same, as if no remainder. But in reality the subsequent part of the will creates no trust at all; for there cannot be a trust without a particular object; as if the devise had been to the College, to give to whom they please; for if they will not present any one, the court cannot compel them: whereas the visitor may under the statutes direct them to present: it has been held in this court, that new ingrafted Fellows may be subject to visitor's jurisdiction: and so new donations may: which was the case of *Clare Hall in Cambridge, March 21, 1747-8. Attorney-General at the relation of Mapletoft v. Talbot* [Ante, 77]. None but the visitor can compel a Fellow to resign at the end of a year, as the will requires. By the answer to the appeal the visitor's right is submitted to: by the canon law an *exprobratio judicis* should have been entered to object to the visitor's jurisdiction; and the court will not grant prohibition after sentence.

For plaintiff. The college, not caring to controvert with the Bishop the right of visitation, chose to make the presentation he recommended. The plaintiff then had no other remedy than in equity to compel an execution of the trust, which was in the College; for no *mandamus* from a court of law could be for that purpose, nor remedy by *quare imp.* or action. Over charities at large, without incorporation, the king's court has consusance by the general law of the land administered there. Corporations for charities must be considered in two views: as a corporation, [466] and as eleemosynary; in the first they are mere creatures of the crown, who only can incorporate: they are capable to sue and to be sued, contract debts, and purchase, and are governed by the law of the land in the King's courts. In the last the consequence is the founder, (he who first endows, endowment making the foundation whenever it happens, 10 Ca. 33, it not being necessary that it should precede, follow, or accompany,) and his heirs have by law a power to direct in what manner his charity shall be enjoyed, and may give permanent statutes, delegate this power absolutely (which makes a general visitor, in place of the founder) or specially, giving up part of his power only, as to visit the head, or judge of one question only; the person in place of the founder has all his powers virtually, though not mentioned: the other has only that given him particularly, and he must shew it. Where the founder dies without heirs, the King's courts take consusance of the charity: so where the founder appoints visitors, who are interested themselves in the question; he having parted with his own power. *Duke's Charitable Uses* 68, 69, 83. 4 P. Wins. 325, the case of *Birmingham School*, that they should not judge in their own cause. The presumption being, that the King's courts have jurisdiction, the party setting up a visitor must shew precisely, that he has exclusive authority; whether in return to *mandamus*, or plea in *prohibition*, or plea to a bill in this court to the jurisdiction, which must be as precise as the others: for this court has certainly juris-

diction, unless the contrary is necessarily shewn. This therefore is a case *strictissimi Juris*, where nothing is presumed: and being the single jurisdiction in which there is no appeal, is to be leaned against by a superior court; and often is complained of, because property is arbitrarily put in power of a single person. The only reason to be given for it is from the property, and the power every one has over that; for that reason patronage arises: to which visitation is compared. This appears from what *Holt* says in *Philips v. Bury*, in *Skin*, that donor's charity must be taken on his terms. None but the donor can make a visitor; nor can the King make statutes on a private foundation without the donor's consent. In *Dr. Bland's case*, *B. R. Mich. 14 G. 2.* the Chief Justice held, that the bare general suggestion of a visitor would not preclude the jurisdiction of this court, but it should appear certainly, that the visitor could do justice in the cause. On the plea itself he does not stand generally in the place of the founder: nor does it shew any special authority to judge of this question. The plea ought to have averred, there were no other statutes by Queen *Elizabeth* her predecessors or successors; and the want of any averment will not be excused in support of such a jurisdiction. *Holt*, in *Philips v. Bury*, allows the visitor's sentence would be a nullity, if contrary to his power; and there was a general visitor, only the mode prescribed: here not. But allowing he is a general visitor, and has consuance over their own livings, it follows not, he has authority over this devise: for there is no case, that a new purchase to a corpora- [467] tion, originally eleemosynary, should be subject to the founder's first donation. The legal estate being in the founder's corporation will not give him that power: nor the uses being among the members: for if a legacy is given to a senior Fellow, on a question to whom to be paid, this court would not refer to a visitor to determine; nor will both together give it. Though a corporation cannot be seized to a use, it may to a trust; there being several informations against corporations to execute them. It may be a trust not only for the members, but for a third person; and there is no reason, why there should be an implied intent in testator to give a power to visit, only because he gave it to the College. Resignation within the year may be by the ordinary course of justice; for this court, though it might not decree surrender of the fellowship, would do the same thing, by saying he shall not enjoy it but upon complying with the will. This court can construe the statutes, when brought before the court to judge, who is senior divine. Inconvenience is not to change the law. Testator is the proper judge thereof; the case of *Clare Hall* differs: that was the same trust carried throughout, though for different persons. In case of the nephew, this court had jurisdiction, would have decreed the College to present him; and would then not have decreed in part only, but to the future trust.

The court, having taken time to consider, now gave judgment.

Master of the Rolls. On the case, as it stands on the pleadings, must the opinion of the court be grounded; for nothing on either side, not contained in the pleadings, can be taken notice of. In the argument many things have been gone into as to visitatorial power in general, and the particular constitution of the visitor of this College, of which there is no occasion to deliver an opinion. But I shall confine myself to the merits

of the plea on the general question whether to allow it or not; and on the best consideration I am of opinion to over-rule this plea.

First to remove an argument much relied on for defendant on the head of inconvenience; that if this living falls not within the conuſance of the viſitor, all livings given or purchased ſubſequent to the firſt foundation of the College, and by a private perſon, and even a bequeſt of books, &c. will be exempted from the viſitor's power. In answer to which, this is not a purchase or general bequeſt of an advowſon to the College without any particular truſt annexed; for then, though it came after appointment of viſitor, and from a third perſon (not the founder) or by purchase, it would fall under the general regulations controuling all the other property of that nature, and be equally the object of viſitatorial power if the former were ſo; but this is circumscribed by particular expreſs truſt, inconſiſtent with the regulations, by which the other property is to be [468] governed; and therefore proper for the juriſdiction of this court; ſtanding on ſpecial circumſtances peculiar to itſelf; the deciſion of which cannot have ſuch extenſive conſequences, as is objected.

The merits of the controversy depend on the conſtruction of the will, and execution of the particular truſts therein contained: both which are undeniably proper for the juriſdiction of this court. Though the will was made ſo long ago, yet it is neceſſary to take up the caſe as it ſtands on the whole frame of the will and from the death of teſtator. It is not a general bequeſt of the living, like any other patron ſeized of an advowſon, but to particular intents and purpoſes ſpecified by the will. Defendant's counſel were forced to admit the words were ſufficient to create a truſt for the benefit of thoſe particularly provided for. At making the will the living was full: and therefore teſtator could only direct, what he would have done on the firſt vacancy. If on a vacancy the nephew, being capable, had offered to take it, and the college reſuſe to preſent him, on his reſorting to a court of equity for an execution of that truſt, which was in them, the court would not have ſent him away without that remedy, which is the ordinary and natural juſtice. A private perſon would undoubtedly be compellable to execute it; and conſidered as a truſt, it makes no difference, who are the truſtees; the power of this court operating on them in capacity of truſtees: and though they are a collegiate body, whoſe founder has given a viſitor to ſuperintend his own foundation and bounty, yet, as between one claiming under a ſeparate benefactor and theſe truſtees for ſpecial purpoſes, the court will look on them as truſtees only, and oblige them to execute it under the direction of the court. They were compellable alſo in ſame manner to execute the next truſt in the will to one of teſtator's name and kin. Defendant's counſel were ſo aware this would be the conſequence ſo far, they endeavoured to ſeparate the caſes of the nephew and kin from the other provisions in the will by ſaying, the two former were now at an end, and that it does not follow, becauſe the court might interpoſe in thoſe caſes, if applied to, they ſhould have juriſdiction in the preſent caſe; which comes under the next provision, and is as expreſs and ſpecial a truſt as either of the others; with this only difference, that thoſe truſts are at an end, whereas this was permanent, to be executed on every vacancy, and calls as loudly for direction of the court as either of the others. If a bill had been brought recently againſt the heir at law, it muſt have been for two purpoſes: firſt, to have

the will declared and well proved and established against the heir, and all claiming under him; next to have the direction of the court for carrying the trusts of the will into execution: the court would have taken into consideration, what were the trusts, and the directions [469] proper on them: and had this trust for the senior divine come under consideration, the court would have declared their sense of the words, and who came within that description; and if the College afterward executed other trust, contradicting the judgment of the court in that instance, by presenting a Fellow they thought came under that description, the court would not have endured such an opposition, but would have relieved the injured party. So if the College were disposed to have pursued the opinion of the court, but were intimidated by the visitor, who put a different construction on the will, the court would have carried its own decree into execution. If this would be so on a recent application, there is no alteration in the nature and reason of the case, that the directions on this part of the trusts are not prayed till wanted in this particular instance. There are many cases of plain trusts, of which there is no doubt, and which the trustees execute without applying to the court: but when there comes a more remote trust of a doubtful nature, and it is necessary to pray for the direction of the court, it would be equally proper to apply them as on the first; and this is the present case; wherein either the College, who are trustees, or the person thinking himself senior divine, for whom they are intrusted, may come into this court for directions; which is the purport of the present bill. This is grounded on the special trusts in the will, allowing the Bishop to be appointed general visitor by the founder; for notwithstanding that, this being given on special trust, the visitor has no jurisdiction to determine, who shall be presented to this rectory, or to interpose in the execution of the trusts of this will. This would be my opinion, were there no inconsistency between the statutes of the College and the will; but when the nature of the statutes are considered, and so far as relates to the College livings, are compared to the trusts of the will, it will appear, that to judge by the statutes, which is the visitors rule, will be contrary to the intent of testator, and defeating the will. The members are sworn to obey the statutes on pain of amotion; but if an advowson is accepted by them on other terms, that must be considered as not within the compass of the oath to the founder: or else it must be said, one cannot be the regulator of his own gift, if there is a visitor. And in all the instances the visitor, whose judgment must be founded on the statutes, cannot execute the trusts of this will; for that would be departing from the statutes; and the adhering to the statutes would be adding farther circumstances to the trust than the testator prescribed, and making it the founder's will, not his. I agree, that a subsequent benefaction may be put under the same power as the founder's; and the visitor will have an equal authority over them; for being a co-founder in that respect, he will be so far considered as appointer of the visitor. In this case the testator is donor; has given rules in his will, which are his statutes; has not made the Bishop visitor; nor excluded [470] this court from its jurisdiction by putting it elsewhere. The right of the visitor is said to be submitted to by the answer to the appeal: but that admission cannot give a jurisdiction the visitor has not, or take away the ordinary jurisdiction of the court, or bind the parties themselves.

2 *Rol. Ab.* 312. pl. 14, that the party may pray a *prohibition* against his own suit. The objection, that this suit is between two, both subject to the visitor's power, proves too much: for none will contend, that in matters out of the jurisdiction of the College between two Fellows, the visitor is to judge. Nor is it an argument, that because an action for damages will lie against the visitor for exceeding his jurisdiction, therefore this court will not interpose. It might be more for the party's benefit to have a specific execution of the trust, and the living for life, than the action against the visitor. So it might be said, where the party proceeds out of his jurisdiction, an action will lie against him; yet in such a case a *prohibition* will go notwithstanding. I do not see, the visitor has any such power of compelling the presentee to resign at the end of the year, as the will requires. He may indeed proceed to a motion in many instances on the statutes; but then it must be for offences contrary to the statutes; having no jurisdiction as to the breaches of the will: but this court can do it, in the same manner as it enforces performance of its other decrees; the non-performance of which will be a contempt, and punished as such by the ordinary process of this court. An obstinate man may indeed in all cases prevent a specific performance; but he does it at the expense of his liberty: nor was that ever an objection to the propriety of making the decree. This is a question of mere matter of property, who ought to have this living under the special trusts of the will. I cannot say (and yet if the plea is allowed I must say) the plaintiff is not intitled to the opinion of this court on the trust in question of this nature or may go higher on any mistake, and not be finally concluded by any single opinion.

LORD CHANCELLOR.

As I entirely concur with the *Master of the Rolls* in the main question, so likewise in his manner of treating it. The case is fully stated; and the only question now to be determined is, whether the plea is sufficient in law and equity to oust this court of all manner of jurisdiction of the cause?

Under the general question two points are made. First, whether it is sufficiently shewn by the plea, that the Bishop is general visitor of this College? Secondly, supposing that to be shewn, and that it ought to be so taken on this plea, whether the presentation to the living under [471] the will, set forth and admitted by the plea, is within, and a proper subject of the visitatorial power?

A third point was attempted for defendant: that the answer by the Master, &c. particularly by the plaintiff before the visitor, and by several acts, there has been a submission to the jurisdiction of the visitor, which is conclusive. But there is no colour for it; for in case of a private, particular, limited jurisdiction, and of courts proceeding by rules different from the general law of the land, no appearance, answering or pleading of the party, will give a jurisdiction to the court: but if there is a want of jurisdiction in the cause, it may be called in question at any time, even after sentence; which is the case of all prohibitions, granted every term by the common law-courts, for a nullity of jurisdiction; so that it may be applied for even against the party's own suit; and the same holds in a collateral action or suit.

As to the first point I agree, that it is not necessary, and therefore not proper to enter into a strict determination, whether or no all the statutes are set forth in the plea; it is not possible for the court to take notice of it; but on so much as is set forth, I think, it appears, the Bishop is general visitor: but he is by the statutes prohibited to give new statutes, or put in execution those of any other: if he does, the College are absolved from obedience; *Q. Eliz.* reserving the power of adding, &c. hence arises the difficulty, as a case may happen, in which the Master, &c. may be subject to be removed by another power different from the Bishop's, and that even for obeying the Bishop's sentence, and how then can the Bishop be said to be general visitor? But I am satisfied on that head that the Bishop for the time being is general visitor, till such a case happens. The grounds, on which *B. R.* went, in the case of *Manchester College, The King v. Bishop of Chester, Pas. 1 G. 2.* governs that question: a *Mandamus* was issued to the Bishop to admit a fellow of that College: the Bishop returned, that it was a royal foundation; that he was general visitor; and set forth the constitution: on exception to the return, *B. R.* ordered a peremptory *Mandamus* on this ground, that it was clear, the Bishop's visitatorial power was then suspended; for he was warden of the College, and could not visit himself; that powers of this kind might cease and revive without inconvenience: and that at that time the jurisdiction was in the King's courts, because no visitatorial power was in force. By like reason as that court held, that a general visitatorial power might cease and revive, and that during the cesser the jurisdiction would for want of particular appointment or reservation of power devolve on the King's court of general jurisdiction; so in the present, where the power of legislation is reserved to the crown: therefore I am satisfied on the [472] doubt I had.

This leads to the second and main point, on the merits of the plea. I agree, that the presentation set forth by the plea, is not a proper subject of visitatorial power. To argue this clearly, the original and nature of visitatorial power must be considered. The original of all such power is the property of donor, and the power every one has to dispose, direct, and regulate his own property; like the case of patronage; *cujus est dare, &c.* therefore if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder or his heirs, or the person especially appointed by him to be visitor, to determine concerning his own creature. If the charity is not vested in the persons, who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power; from which account it appears, the nature of this power is *forum domesticum*, the private jurisdiction of the founder, and cannot extend farther, unless some other person grafts upon it, and by express words or necessary implication subjects the estate or emolument, given by him, to the same visitatorial power, and to be governed by the same rules; and then the former visitor is a visitor created by that subsequent founder or donor: the grounds of which appear from *Holt* in *Philips v. Bury*, 1 *Ld. Ra.* 5, more at large in *Skin. Sho. Parl. Cases*, 35. The topics of Bishop *Stillingfleet* are drawn from foreign laws; to be governed by the Ecclesiastical law, which the law of *England* totally disclaims and rejects. The founder may give a

general power; or may limit and bind by particular statutes and laws; may give the visitor power of altering or giving new statutes; or may restrain from doing it, or from acting according to any other; as is done in the present case. If the power to the visitor is unlimited and universal, he has in respect of the foundation and property moving from the founder no rule but his sound discretion. If there are particular statutes, they are his rule, he is bound by them; and if he acts contrary to or exceeds them, acts without jurisdiction; the question being still open whether he has acted within his jurisdiction or not, if not, his act is a nullity. *Holt* in *Philips v. Bury* where the Bishop of Exeter was undoubtedly visitor generally.

To apply this general reasoning: I will lay down some propositions, which I will afterward illustrate. First, this rectory was no part of the property of the founder: but given by a subsequent donor on special trust. Secondly, this trust is limited by rules different from, and in some parts contrary to the statutes of the foundress. Thirdly, the visitor has authority to judge only according to the statutes of the foundress, and is restrained from acting otherwise; consequently has no power to execute this trust. Fourthly, the Bishop cannot give remedy in many cases, which may arise on this trust. Fifthly, as a consequence from the [473] whole here is a nullity of jurisdiction in the visitor; and relief must belong to the King's general courts of jurisdiction.

As to the first the fact is plain: and admitted to be a trust. I agree in general, that if a subsequent donor gives the legal estate, or in trust for the College, without a declaration of a special trust it will fall under the power of the general visitor to judge of the legal property in the one case, or the equitable in the other; because by giving in trust for the College generally, and neither creating a distinct visitor nor a special trust, the donor has by plain implication intended, it should fall under the general statutes and rules of the College, and be regulated with the rest of their property: although in the latter case indeed a bill must be in equity to compel the trustees, if they refused; but in the present, the testator has declared a particular, special trust which must in some way be carried into execution, and the will observed.

The second appears sufficiently in many instances on comparing the trusts of the will with the statutes.

The third also appears plainly from the statutes. But it is said, the will may be considered as a new statute as to this: if so, the visitor is absolutely restrained from executing this trust, and the Master, &c. prohibited from obeying; from which would follow absurdities. The objection is founded on the principle, that this is a living within the description of the statute *cujus ad Collegia collatio pertinet*; but it is not so; those words and that statute are to be construed of livings, where not only the legal estate, but also the trust and equitable ownership, belongs to the College absolutely: whereas in this case, though the legal estate of the advowson is in the College as a corporate body, it is on special trust for a particular person described: which puts an end to the visitor's power over it; for that should not set up a different rule in equity, from what would be at law as to the legal estate under like circumstances. Suppose, after the foundation of this College the crown had granted an advowson or land to the senior Fellow of that College: this grant would have

operated to make the senior Fellow a sole corporation according to 4 *Leo.* 190, which was admitted in the case of *the University of Cambridge v. Crofts, B. R. Pas. 13 Queen Anne*, the Bishop could not take away the legal estate vested in a sole corporation, though it happened to be a part of the aggregate body, and give it to the aggregate body.

As to the fourth, it is admitted for defendant that if the devise had been to a stranger on the same trust (i), the visitor could have no power over it. The equitable must be like the legal: only the College would be obliged to apply to this court to compel the trustees to execute. It cannot differ the case, that the corporation of the College happened to be the trustees. Suppose, it had been on trust to present a member of another College, the visitor of this could have no power over it; and the present case differs not in substance from that. On the first [474] branch of this trust and on the last, where it is to present to a stranger, it is admitted the visitor could have no power: but it is contended for over the intermediate branch, because among the members of the College subject to his jurisdiction; and is compared to the case of a particular estate to the College, remainder over: but that is not like this case; the College there having the absolute ownership during its continuance, here not. Suppose on a vacancy all the Fellows in their turn should do an act, which the Master and major part of the Fellows should conceive to be an absolute refusal, and should thereon seal a presentation to a stranger; and before institution one of the Fellows should allege, that in fact he had not refused, that the College mistook, and should present him; and he appealed to the visitor upon their rejecting his claim: the visitor could not judge of this: there intervening the right of a stranger not subject to the visitor's jurisdiction, and whom he could not compel to give up his presentation; and therefore none but one of the King's courts of equity could judge, if it was a binding refusal, or could give relief. Suppose a Fellow completely intitled should at the end of the year refuse to resign: the visitor could not compel him, for he could compel only for breach of the statute, which this is not; application for relief must be to some court of general jurisdiction, who may decree a resignation of the fellowship or living, and enforce the decree under the general penalties of contempt: so that this argument for defendant turns the other way. I admit, that in *Philips v. Bury*, contumacy was held good cause of expulsion, and *B. R.* would not examine into the fact of that contumacy; which was right; but it appeared to be a contumacy within the Bishop's jurisdiction, which must be shewn, though the contumacious fact need not be specially shewn. But admitting for argument sake (and no otherwise) that that need not appear in expulsion for contumacy, it does not follow, that because a person may take advantage of general pleading to cover a nullity of jurisdiction, he therefore will. I am sure the present Bishop would scorn to take such advantage, if it might be taken. But we are not now on a case of expulsion: it is sufficient to shew that the visitor, though general, could not give an adequate remedy in many cases on this trust: and the case of *Eton College, Mich. 14 G. 2 King v. Bland*, is an

(i) Visitor can only decide a private dispute; if there is a dispute by a third person against a corporation, to perform an agreement, visitor cannot decide, as he cannot compel a specific performance. Cowp. 373, nor tender an oath, Dougl. 342.

authority; where the court held, that the bare averment of a visitor would not preclude the jurisdiction of the court, but the extent of his authority must appear, that the court may be satisfied he can do complete justice; and therefore a *mandamus* was awarded.

As to the fifth, whoever has a right by this trust, must have [475] remedy; and I have shewn, the Bishop has not power to give it. It is admitted, that after testator's death, a bill might be to establish this charity and carry this trust into execution, and the visitor would have no jurisdiction; the court must then have decreed for a performance according to the will; and supposing a question had then arisen at the bar on the construction of the words of the will *senior Divine then Fellow*, the court must have determined that, and have laid down rules for execution of the trust by the College in all future times; which would have been binding to the College, the visitor, and all persons: the ground of which is, that there must have been a complete performance, and there is no instance of this court's decreeing a trust by piece-meal or parts. Nor is it any answer, to say that no such decree has been made; for the legal estate is in the trustees, and this trust is for ever executory, and always subject to be so, till determined in equity, (k) and therefore such a construction may be made at any time. The reason of the case of the *King and this very College*, 4 *Mod.* 433. *Skin.* 359, 368, 393, 546. *Comb.* 279, is very material. It might be said there, as has been here, this is a power superadded and annexed to the visitor's: the court said there, it arose on the public laws of the land. The only difference between the two cases is, that arose on a public act of parliament relating to government; this on the general rules of equity, which is part of the general law of the kingdom. It is said, new donations may be subject to the visitor's jurisdiction, as it has been held, new engrafted Fellows may; but that is not *ad idem*, for this is founded on a new donation and special trust: the case urged for this is that of *Clare Hall* (long after that in 5 *Mod.* 421,) where I allowed the plea [Ante, 78.] I am not an enemy in general to visitatorial power, but incline to support it as far as necessary; and went there farther than *Holt* did in 5 *Mod.* but the reasons on which I founded myself there, hold not here. There was a plain implication to subject to the general visitatorial power to avoid confusion, which would arise, if every one coming in as a Fellow should not be subject to College discipline: and in 2 *Jo.* 175, it is determined, that power of expulsion includes power of admission. I there indeed laid weight on the inconveniencies which might arise from a different decision; which were obvious, but different from the present, for it is not so necessary in this case, that every special trust, consisting of various parts, should be subject to the jurisdiction of that visitor: nor will the like confusion ensue. The visitatorial power, as allowed and established by the law of *England*, and on the grounds on which it is established, is most useful in Colleges and learned societies; and I am for supporting it as far it is established by the constitution of this kingdom, particularly by the judgment in *Exeter College's* (l); but am not for extending it farther; much less for giving way to and extending it on principles and rules derived from foreign laws, which the law of

(k) 2 *Brown*, 51.

(l) 2 *Vol.* 327.

England rejects: and concur on the whole, that the plea should be over-ruled.

ANONYMOUS (1), *June 15. 1750.*

[476]

Injunction before answer to restrain other ferry-boats denied.

Granted to stay waste.

Or where the right appears of record.

MOTION on the part of the plaintiff's lessees of the Dean and Chapter of *Durham*, for an injunction to restrain the defendants, certain fishermen, from using ferry-boats on the *Tyne*.

LORD CHANCELLOR.

(m) This was moved before; and denied, because the plaintiffs had not shewn, that they had kept up sufficient ferry-boats. I had other doubts on that motion. It is not of course to come into this court on infringement of a franchise to have an injunction upon filing the bill before answer. The general rule is after the answer: in bills for an injunction to stay waste, the court will grant it before answer, on filing the bill (n), and shewing that waste may be committed; because there cannot be a compensation, and it may be an irreparable mischief. To be sure there may be some cases, as in a matter of account of damages, where the court does it; that is, where the right of the plaintiff appears on record. In cases therefore of a new invention by letters patent, a bill may be filed for infringing that right; and before answer (the right appearing by matter of record) on filing the bill and affidavit it may be granted. So in the case of a book-vending,* which by act of parliament is vested in particular person, though the right not appearing by record of this court, yet being grounded on an act of parliament, that might be a foundation to grant injunction before answer: but otherwise in these special cases you must stay till answer comes in. However as the right of the plaintiffs to the sole use of this ferry appears on record by decree of Lord *Comper*, I thought that the record of this court was a sufficient foundation to grant an injunction before answer: and there have been cases of that kind; where a right has been tried by the parties, that right appearing by record of the court, has been thought a foundation to grant it before answer. But this was a very tender case to interpose to restrain before answer; being of great consequence to the city of *London* from the coal-trade. Therefore as it was not shewn, that the plaintiffs kept up sufficient ferry-boats to carry passengers, &c. I denied the motion. This has now been endeavoured to be shewn by affidavit; but the affidavit is not sufficient

(m) 2 Vol. 414. 453.

(n) 2 Brown, 65, 88. A general affidavit, the plaintiff was entitled to the fee-simple, is not sufficient to obtain an injunction, a particular title must be set out. 1 Brown, 57.

* 1 Brown, 451. 2 Brown, 80.

(o) 1 Brown, 218. Ante, 258.

(1) This motion is entered in the minute-book, as on the part of the "*Dean of Durham*."

for that purpose. On the circumstances I will not restrain, and construe it a breach of the privilege. This like the ferry on the *Thames*, and passage-boats to *Gravesend*, which have a sole right of carrying, yet other wherries do carry every day; and it is not held an infringement of that right.

AMESBURY v. BROWN, June 16, 1750.

(Reg. Lib. 1749. A. fol. 591.)

Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by reversioner after the wife's death, no interest allowed to the husband during his wife's life-time (1).
As to tenant for life keeping down the interest of an incumbrance. Real estate rendered by a testator *primarily* liable (2).

A WOMAN was seized in tail of an estate, reversion in fee to the right heir of her brother, of whom she was one out of four; but seized of the equity of redemption only; the legal estate having been conveyed by mortgage by her ancestor the testator. She levies a fine, and makes a conveyance of this estate by lease and release to *Brown* in consideration of money paid, and of paying £600 due on the mortgage, and of paying legacies by the testator's will charged on his estate. Afterward she intermarries with *Brown*; and previous to the marriage a settlement is made of this estate (which was the husband's under the prior purchase) to the husband for life, afterward to the wife for 99 years if she so long lived, remainder to issue of the marriage, remainder over. After the marriage, the husband takes an assignment of the mortgage, reciting that the premises had been devised to his wife, and a conveyance of the legal estate in fee to use of the husband; the wife dies without issue; the husband continues in possession.

The three co-heirs of the first testator, intitled by the reversion in fee, bring a bill against *Brown*, the surviving husband, to redeem this estate on payment of the incumbrances on it, so far as they are obliged to pay, and to have an assignment of three-fourth parts to them; insisting they were not obliged to pay interest on the principal sum of these incumbrances farther back than from the death of the wife; and that as defendant has taken in the mortgage, and received the profits, the interest during her life was supposed to be paid: though in general it was a prevailing principle, that tenant in tail subject to a preceding incumbrance has a right to continue not only the capital but to charge with interest also; yet there is another rule, that if tenant discharges the interest of incumbrances, neither he, nor any in his place, shall be permitted in equity to set up that as a fact undone, but the remainder shall have the benefit of it; and none in place of tenant in tail can insist on being a creditor on that estate.

For defendant, it was insisted, that though he received these profits, he received in right of his wife, tenant in tail, who was not obliged to keep down the interest for reversioner; and received them on supposition that the settlement was good, and the ownership of the estate would follow it. Therefore he must be redeemed on payment of the whole principal and

(1) See *Kirkham v. Smith*, ante, 258.

(2) Vide 1 Roper on Legacies, 277, 257.

interest, during the time he was in possession, and if the mortgage had remained in the mortgagee. In *Sarjeson v. Cruise* (3), October 26, 1742, *Jane Pit* was tenant for life of an estate with power [478] to charge any sum, not exceeding £4000 on the estate in question; which estate was limited to her son *William* in tail, remainder to the right heirs of the father; the plaintiff claimed in the same way as the present plaintiffs; and insisted, they were under no necessity of claiming as heir at law of *William Pit*, as the remainder in fee never came into possession in his life, but to the right heir of the father, and therefore the personal estate of the infant *William Pit* was obliged to keep down such interest, as accrued due in life of tenant in tail, on which his Lordship was against the plaintiffs; for that the owner of an estate in tail, remainder over, never was made a debtor in such a case. But what the court went on in its determination, which was in favour of the heirs at law, was, that *William Pit* being an infant, the guardian ought to have applied the rents and profits of the estate to keep down the interest in discharge of the incumbrance: and therefore, what ought to be done by the guardian should be considered as done; and consequently the real estate discharged so far, as the rents and profits in life of the infant would go in discharge: but if that not sufficient, it was made an incumbrance on the remainder. *Chaplin v. Chaplin*, 3 Will. 235, shews, there is no obligation on tenant in tail to keep down interest of a mortgage. This is to be considered in the same light as if the mortgage had been in a stranger. It is not the case of coming to have the personal estate applied in exoneration against the personal representative of the wife, which would be allowed in general. The question is, whether a husband, tenant in tail in his wife's right, is intitled to interest of the mortgage accruing during wife's life? Notwithstanding the rule insisted on, a court of equity will still take into consideration the manner in which that mortgage is paid off: although if it had been a distinct transaction of a husband tenant in tail taking in a mortgage with a view of discharging and clearing the estate, with other circumstances: the court would not consider the transaction in any other light.

LORD CHANCELLOR.

This is clearly as favourable a case for the representative or husband of tenant in tail, seised of an estate in right of his wife, to claim the benefit of the interest, that accrued during life of that tenant in tail on this mortgage, and to have it paid on a redemption made by the reversioner, as could come before the court: because here was a plain intent in the tenant in tail to have made the estate her own: but she has failed in the manner of doing it, by levying a fine only; which could only bar the issue; not the reversioner or remainder. She being disappointed therein, the reversioner, who might have been barred, comes to have possession of the estate. This being so favourable a case therefore for defendant, I directed it to stand over, to see if there was any determination to govern my judgment. There is none directly on the point; [479] therefore I must determine on general rules; and what weighs with me, is the fear of breaking in on general rules; which may be of bad consequence in other cases: overturning what has been taken to be established.

She was intitled herself to the reversion in fee of one fourth part of the reversion; the other three fourths belonging to the plaintiffs, the other three co-heirs. She might by recovery have barred the reversion in fee in the whole; by fine she could bar it in her own fourth part. The taking the assignment of the mortgage by the husband appears to be after the marriage from the recital, when the husband, if the settlement had been good, was seized in his own right for life; if not good, and the estate in tail continued, he was seized in right of his wife.

The question arises, from what time interest is to be computed? I am of opinion, the husband is not intitled to have any allowance of three-fourth parts of the interest, considering him in any light.

First consider him as a purchaser of this estate by the agreement and conveyances, made with her, then a *feme sole*; which is the true way; but if that was out of the case, considering him as husband of tenant in tail in possession of the estate, having taken in a mortgage of the estate: the rule of equity would be, that his purchase would be defeated; but he should have the benefit of the mortgage so taken in for satisfaction of his principal and interest, that is, so far as not satisfied by the rents and profits of the estate; and if his purchase was defeated, he must be considered as a mortgagee. If as mortgagee in possession, he must account for the rents and profits of the estate; and out of these rents and profits the interest of the mortgage must be kept down. If he had purchased the reversion only, and taken an assignment of the mortgage, and never came into possession, and his purchase then defeated and evicted, he would be intitled to have his whole principal and interest; because he received nothing out of the estate to keep down that interest. But those profits he received must be applied to keep down the interest of the mortgage, considering him as a purchaser, or mortgagee in possession if his purchase does not stand. This is on the foot of the purchase; taking it in the least favourable light for defendant; nor on the foot of the settlement will it mend his case; for as tenant for life under that settlement he would be bound to keep down the interest; so would the wife, if she survived.

Which brings it to the second way of considering it, as if the purchase and settlement were out of the case, and considering him as having married tenant in tail of an estate, reversion in fee to strangers as [480] to three-fourths, and being in possession in her right, taking in a preceding mortgage binding that estate in tail, and afterward continuing in possession, and receiving the rents and profits. The question then will be, whether such a husband, after the death of his wife without issue, is intitled notwithstanding receipt of the profits, not to be redeemed without paying the whole interest? In general a court of equity endeavours to make every part of the ownership of an estate bear part of the incumbrance: as if there is tenant for years or life subject to a mortgage, they must keep down the interest during that time. But there is a particular estate, called an estate tail, which is distinguishable; and therefore it is true that in general cases, if there is tenant in tail remainder over, subject to a preceding mortgage or incumbrance; and tenant in tail is in possession and receipt of the rents and profits, the mortgage in hands of mortgagee; and he lets the interest run in arrear without applying to keep it down; neither the issue in tail nor the remainderman can come against that tenant in tail to compel the keeping down the

interest, nor against the representation of tenant in tail after his death, to compel the indemnifying and discharging the remainder from that arrear of interest incurred during possession of tenant in tail and his receipt of the profits, unless in that single instance, which was the case of an infant, of *Serjeson v. Cruise*. *Chaplin v. Chaplin*, is said to be determined differently from it: but I do not know whether they agree in circumstances, which may make a great difference. I went on the general rule, that the act of a guardian or trustee of an infant shall not alter his property or that of those coming after him. Where there is tenant in tail of full age, courts of law as well as equity, consider the reversioner, or remainder, as in the power of that tenant in tail. But the case of an infant tenant in tail is different; as he cannot bar the remainder unless under the King's privy seal; a method which is never granted voluntarily to change the rights of the parties, but in case of some family-settlements, which is not the present case. The next consideration is, how the case will be, suppose, that tenant in tail takes an assignment of the mortgage to himself, and dies without barring the remainder in fee. Taking the assignment to himself, he will be considered as owner of the estate, and as it is said in *Chaplin v. Chaplin*, seised of an estate which may continue for ever: then perhaps the reversioner would have stronger reason to say, the whole estate was discharged of this mortgage, than on the other side the representatives of tenant in tail could have to say, they should be reimbursed the interest incurred due during his life; because it may be considered as waiting upon the inheritance during that time; but it has not been carried so far as that. In the case of Mr. Smith of *Weald Hall* in *Essex*, tenant in tail died without barring, but had taken in a mortgage, which was considered for the principal as an incumbrance on the estate: but the question of interest did not arise there [*Kirkham v. Smith*, ante, 258.] Then supposing this taken by tenant in tail him- [481] self in possession, how stands it in respect of the interest? No case is cited, where such a tenant in tail being in possession his personal representatives has been allowed to burthen the reversion in fee with the interest incurred during his life, where he was owner both of the estate in possession and the charge. And it would be of very mischievous consequence, if it should be taken to be otherwise. Suppose he had died and left issue in tail: could the personal representatives of tenant in tail come against the issue to burthen that estate with the interest of that mortgage: It would be considered as taken in for the benefit of the issue in tail. Cases of this kind depend on such a variety of circumstances, it is impossible to draw the line. The tenant in tail was but tenant at will to the mortgagee; who might have brought an ejectment, and turned him out of possession, and have received the rents and profits; there the profits would be taken from the tenant in tail during his life. Suppose tenant in tail had afterward brought a bill to redeem the mortgage: he must redeem on payment of the principal, interest, and costs: then should that burthen the estate of the remainder with all that interest, which had been paid out of the rents and profits of that estate in the hands of the mortgagee? None can tell when tenant in tail took the mortgage, or on what grounds it was done. The reason might be, that the mortgagee intended to bring an ejectment, and turn him out of possession, and take the rents and profits to his own use. That does not appear: but various reasons

might be for taking in the mortgage: to prevent suits, &c. by foreclosure or ejectment: and it would be making it liable to too great uncertainty to say, that all the minute considerations of tenant in tail, taking an assignment of a mortgage should be considered by the court on a question between the personal representative of tenant in tail and the reversioner, after it come into possession. I do not see how this differs from the case of interest paid by tenant in tail; Suppose, the mortgage had remained in the hands of a stranger, the mortgagee; and tenant in tail, after being in possession had paid the interest: the personal representatives of that tenant in tail could not come against the owner of the reversion for a satisfaction of that so paid out of the estate. There is no instance of it. Then if the interest is kept down; not by payment of the mortgage, but by tenant in tail being in possession and taking the profits of the estate and mortgage to himself; he has paid himself that interest out of the rents and profits of the estate. But that is not the case: and therefore I am unwilling to make a precedent of the representatives of tenant in tail calling back the interest of that incumbrance paid; and it is right to let things stand as the courts find them at death of tenant in tail; neither is that strictly this case; this being a case of a mortgage taken in by husband of tenant in tail seised in right of his wife; but that will not make [482] any difference: for the husband of tenant in tail so seised ought to be considered in the same state as tenant in tail ought to be exactly, and in no better; taking the estate subject to all the incumbrances, actions, and remedies, the mortgagee had in the estate, and to the right and estate the reversioner or remainder-man had in her estate: and consequently has not a right, after having received the profits of the estate during the life of the wife, to come against the remainder for satisfaction of the interest; which naturally the rents and profits are to answer. This is not setting up a right to come against the personal estate of tenant in tail to satisfy arrears of interest; but setting up a right in the representatives of tenant in tail to bring a burthen on the reversion in fee, which has been discharged by tenant in tail himself: and, as there is no precedent, I will not make one. Besides it falls in with natural justice, that those, who have a divided interest of an estate, should keep down the burthen during their own time.

Therefore an account of the profits must be directed accrued since the death of the wife; and from that time he must have an allowance of the interest accrued since on the mortgage, and on the legacies that were paid off.

The testator, having given his estate generally after payment of debts and funeral, without mentioning legacies, afterward gives four legacies to each of his four sisters; and in the same clause, "all which legacies, I mean (p), shall be paid out of my freehold estate in N." and by a subsequent clause gives a power to mortgage and charge the real estate for payment of that money.

(p) Where enumerated legacies are expressly charged on land subsequent legacies shall not affect it, but shall be paid out of the personal, 1 Brown, 261. If the debt is not contracted by the party, the personal estate shall not exonerate the real. 2 Brown, 57. 2 P. Wms. 591. 2 Vol. 569. 2 Brown, 101.

It was insisted, that a legacy generally given is payable out of the personal estate; and though afterward made a charge on the real, yet, as heir at law is not to be disinherited, the court looks on it, that unless the personalty is expressly exempted the legacies shall be payable out of the personal.

LORD CHANCELLOR.

This is not within the common rule; not being a common charge on the real estate in aid of the personal, but an express incumbrance on that estate; an express gift of the legacy out of the real estate (q); which wherever done, the real must bear that burthen, and the personal is not applicable in aid: and this is strengthened by the subsequent clause: by which he meant, the tenant in tail should have power to do it even without suffering a recovery.

(q) In 1 Brown, 144, Lord *Thurlow* said, to exempt the personal, testator must shew his intent; it is not sufficient to charge the real, but he must shew that his purpose is, that the personal should not be applied. *Ibid.* 464. Lord *Thurlow* recognizes this doctrine, and lays down the rules which exempt the personal. 2 Atk. 625.

ASTLEY v POWIS, *June 23, 1750.*

[483]

(Reg. Lib. 1749. A. fol. 662.)

Vide S. C. further, post, 495.—Covenant, before the act, reducing the rate of interest to pay 6 per cent. is not prejudiced by the act; but interest turned into principal, by the course of the court, was directed to carry interest at 5 per cent. only, from the passing of the act. Interest by course of the court, discretionary. See *post*, 495.

The court will go as far as it can, to attain payment of debts. Real estate where charged, affected by equitable as well as other debts.

A sum of money was due by covenant on articles on a decree against Mr. *Langley* in 1694, and a report was made and confirmed, which ascertained and liquidated the whole sum and interest thereof at the then legal interest as well as the principal, viz, 6 per cent. amounting to an accumulated sum of £1440.

It was insisted, that there should be 6 per cent. on all the arrears since: there being no discretion in the court to abate the interest: in *Mason v. Fausset*, Lord *Talbot* thought, that when the arrears of interest are computed since the reduction of interest upon a mortgage carrying 6 per cent. he could not make a variation in respect of future interest to be paid on that accumulated sum; because that interest is to ensue the principal: but Lord *Hardwicke* was afterward, 4th March 1742, of a different opinion, and held, that should not be the rule; that the principal sum should carry the original interest: but the accumulated sum arising after the reduction, should carry less interest, upon the distinction that the making the interest principal by intervention of the court should be considered as making interest principal by agreement of the parties; which if done after the statute reducing the rate, that agreement could not make more than 5 per cent. But this is an accumulated sum fixed and ascertained by

the report before the reduction of interest, which was not till 1712, therefore there is no discretion in the court, to vary from the legal interest it bore at the time.

LORD CHANCELLOR.

(r) If this instead of a covenant had been a bond with penalty, the penalty, being a debt at law, would affect the real estate. But it will depend on the will of Mr. *Langley*, whether the whole real estate is subject to payment of debts: for if it is, it will be affected by equitable as well as other debts. Therefore it must stand over to look into the will, whether the real is charged with payment of debts thereby. There are cases which have gone a great way; and the court to attain payment will certainly go as far as it can (1). [Continued post. 495.]

(r) 2 Vol. 314.

(1) See *Kidney v. Cousmaker*, 1 Ves. jun. 436. and 2 Ves. jun. 267. and *Williams v. Chutty*, 3 Ves. 545.

THE KING v. CURTIS, *Trinity Term, 1750. Exchequer.*

Diem clausit extremum issued for a simple contract debt to the crown.

A *Diem clausit extremum* having issued to inquire the day, year, and place of the death of *Curtis*; what goods, chattels, debts, &c. he had thereon: and to whose hand they afterward came, and now are [484] in; what lands and tenements he had on his death; who has since received the rents and profits, and does now: and that the whole should be extended and seised into the King's hands. There was a seizure in consequence thereof.

Application was made by the creditors and administrators of *Curtis* to set aside this writ, as issued improperly; for that the debt due from *Curtis* to the crown was by simple contract, and not on record at the time of his death; it not being a debt on record till the inquisition taken after his death: which shall not have relation to make it so in his life, and will not warrant this writ; which cannot issue for a simple contract due to the crown at his death. Till the act putting bonds on the foot of a debt on record (which was to facilitate the recovery of it, as then there would be sufficient ground to award execution) the crown could not have done this upon a bond: then certainly not upon a simple contract, for which there is no lien on the real estate to affect it in the hands of heir, devisee, or purchaser: as it would, if it had been a debt on record at his death. As to the personal estate, though the assets are administered in paying judgments, this writ is to fetch all back, and would overturn any payments made by debtor of *Curtis* to his executor, although such payments were good; and according to this a sale in market overt will not affect the right of the crown, who may follow into the hands of a creditor, or of whoever bought up this personal estate before the inquisition, and drive them to their remedy against the executor, who may be worth nothing. This matter was never yet determined: and the prerogative should not be extended further than the benefit of the public.

The court took time to consider, and this term gave judgment, that the writ issued properly; but did not determine the points.

Against the crown had been cited the *King v. Wilkinson* [Bunb. 315]; whose estate had been attempted to be brought within the statute 13 Eliz. c. 4. which the court there declared, they could not do, because he was not an officer within that act.

Baron *Clarke* said, it was not so: the question there was, whether a man becoming a receiver, his estate was so bound from that instant, that notwithstanding several *quietuses* and settlements they would be all overreached, and resort might be to the lands in the first instance? That the case was never determined: but no countenance was given to it, because purchasers might think from these *quietuses*, that they were safe [In *Bunb.* 317. Judgment for defendant.]

GIBSON v. LORD MONTFORD, June 25, 1750.

ROGERS v. GIBSON.

(Reg. Lib. 1749. A. fol. 583.)

S. C. Amb. 93. See 4 Ves. 288, note.—Devise of real, leasehold, copyhold, and personal estate to trustees, their executors, &c. first for payment of annuities, &c. upon a deficiency of the personalty; "and as concerning all the rest, residue," &c. in trust for the children of A. but if she died without issue, then to B. and C. The intermediate profits pass by this residuary devise.

Not necessary the word "*heirs*" should have been inserted to carry the fee, for trustees have a fee when the purposes of the trust cannot be answered otherwise.

Trust of copyhold devisable without surrender. But otherwise, as to copyholds of which the testator had the legal estate. Lands agreed to be purchased after the will, and before the first codicil, pass by such codicil, operating as a republication.

Q? Whether a codicil relating in its terms only to personal estate, and yet executed according to the statute of frauds, can operate as a republication of a will as to real estate after purchased. See *Piggott v. Waller*, 7 Ves. 98. As to rents and profits directed, or held to be accumulated, et c. contra. Difference of the word "*residue*", with relation to real estate, or to personalty. Trust of copyhold.

Where on executory devise all the rest and residue include intermediate profits.

Where a codicil is a republication so as to pass land purchased after the will.

If the codicil related only to personal estate. Q?

MR SHEPHERD by his will gave all such wordly estate, as it pleased God to bless him with, as follows: All and singular his freehold, leasehold, copyhold, and also personal estate of what kind soever to trustees, their executors, administrators and assigns, in trust to and for several uses; to pay several respective annuities, sums and legacies by and out of the produce of the personal estate: if that should happen to be deficient, then to pay the same by and out of the rents, issues, and profits arising by the real estate: and as for and concerning all the rest, residue and remainder of the real and personal estate of what nature and kind soever, after provision being made for the payment of the legacies, &c. he gives to such child or children, as his daughter should have lawfully begotten, whether male or female, equally to be divided between them; if his daughter should die without such issue of her body lawfully begotten, then to two other persons equally to be divided between them share and share alike. In another clause in the will he directs and orders, that upon the death or deaths

of all and every person or persons, to whom annuities for their lives were given such annuities as should fall in from time to time, should go back to the residue of the real and personal estate, and go to those in remainder over. By a codicil he adds, provided his daughter die without issue; but if she should leave a child or children, such annuities as fell in should be divided among them share and share alike. He executes another codicil, reciting that whereas he had by his last will of such a date given and devised to his executors a sum of money in trust for *A.* and another in trust for *B.* he revokes those legacies, and desires, that writing should be a further part of said last will and testament. Before the last codicil he had made a purchase of some lands.

Two questions were now made, beside what related to the copyhold. One concerning the surplus rents and profits of the real estate after satisfaction of the particular charges on it created by the will, till such time as the person to whom he devised on contingency, viz. a child of the daughter, came in *esse*; whether they were to go either as part of the residue to attend the several limitations of that residue, or to the first taker of that residue, or to the heir at law? the other question was, whether the after-purchased lands should pass by the will?

[486] It was insisted, the whole being given away, there can be no resulting trust for the heir: great pains being taken to prevent an intestacy as to any part. Though the heir wants not the intent of the testator, if it rested on that alone, yet, when a question is doubtful, what is comprised in the residue, what the testator designed, is material in deciding it. This residue consists of a compound fund of several ingredients. In the clause of annuities falling in, the word *residue* cannot mean simply that estate the testator possessed at his death; speaking of what it is supposed to have happened after his death; it being the residue of the profits out of which these annuities are to be paid. In other branches of the will he has industriously affected an accumulation of the produce of different parts of his estate; for in a legacy to a particular person he has taken care the interest should be accumulated from time to time: *a fortiori* his design was the same as to the residue intermediate. He considered his estate not as consisting of the inheritance exclusive of the rents and profits during the contingency. Devise of rents and profits gives the estate itself, *Co. Lit.* Had he said so in terms, there would have been no doubt; and here are words sufficient for that. Most cases of accumulation depend on the particular circumstances; as did *Hopkins v. Hopkins* and others, before his Lordship (1). It was sometime, before such a devise to a person not in *esse* was allowed; but now it is. It must be admitted, the estate in the mean time will descend: on the other hand it must be allowed, one may direct the profits for the person unborn, where he has devised his estate by way of trust; because that limitation must be within a life in being: and there is sufficient to shew, that was his intent. *Residue* generally would not in case of real estate have the same construction as of personal: in the latter it meaning every thing, however arising, as a lapsed legacy, or any thing not particularly mentioned, or given on contingency: not so as to real estate (2), as the intermediate

(1) *Ante*, 268.

(2) See *Durour v. Moltuez*, *ante*, 321.

profits of an estate to take effect on a future contingency would descend: but here the testator has shewn he intended to comprehend all the profits under the residue; and as the heir admits, that giving the personal estate gives the profits of it, by mixing both he shews his intent, the intermediate profits of the real should go the same way.

Next, the after-purchased lands pass by the codicil: it being a republication, executed according to the statute, and as a confirmation of the will. Both together make up a complete will, whether it takes away or alters part; and every codicil is supposed annexed to a will and part of it, though not actually fastened thereto, as this in fact was found to have been at testator's death; who therefore substantially re-executed the will itself; and then it must be shewn, that it was in a different condition at the time of making; as where part of a will appeared to be struck out; but not when done; for the court must take it to be [487] as at that time. It is not easy to know the reason of the distinction between a devise of a real and personal estate, which the testator had not at the making. In some books it seems to depend on the word *having* in the statute of *H. 8*; but perhaps it may as well be from analogy to custom. But if after the purchase he declares the former to be his will, he need not repeat the devise over again; and he has plainly done so by this. A codicil in its nature implies a ratification, so far as it does not vary: if it repeals the whole, it is not a codicil, but a new will. Whether he says *republish*, or recites the former will, or declares his intent it should stand, it amounts to the same. It is not necessary he should declare to witnesses, it is his last will; nor even in the first will to tell the witnesses he publishes it, if signed and sealed: as was determined lately in *B. R.* on two cases sent out of this court, *Trimmer v. Jackson* and *Whorwood v. Scot*, that delivery by testator as his act and deed is sufficient. Notwithstanding the statute of frauds a will may be made, properly attested, giving real estate to such uses as contained in such a settlement, though that settlement is not attested by three witnesses, and it would pass new purchased lands; for sufficient certainty, by referring to something certain. So if it is to such uses, as he shall declare on a particular occasion, or as another shall appoint, though that is not attested by three; for any thing shewing his meaning with sufficient certainty will do. This codicil is as much a part of the will, as if all the words were recited in it; nor can there be a stronger republication by a distinct instrument, unless he had said, *I confirm*; and it is the same here, as if he had. In *Carl v. Carl* (1), a man created a term for years, settled it on trustees for benefit of himself, and by will gave it to his son, making him executor; he renewed the lease several times, and died with the like lease in trustees for him: but he wrote on the back of his will, that if his son should be prosecuted by the government so as to incur a forfeiture, and be incapable of enjoying the lease and being executor, he gave it to his other son and daughter. No forfeiture happened: the question was, whether the son, to whom given by the will while it was another actual lease, should be considered as devisee of this lease at the time of the death; it being insisted that writing was a republication of the will: and of that opinion was his Lordship: that the words were sufficient to take it in. There was a direction in the

will, that the lease should be renewed; which shewed he meant a renewed lease, and by this writing he considered it as his will, and the same as if he had recited his will. It was a republication; and it could pass by the general words; his intent appearing that any renewed lease should go; which shews, there need be no words of republication or confirmation, he considering it as his will.

For the heir at law. Whatever is not given away, descends; [488] the heir not being disinherited by doubtful expressions. *Gardener v. Sheldon*, *Vau.* the same in uses and trusts: as in feoffment to uses for life or in tail, the fee results back. So in trust to sell and pay the profits over at a particular time. Here is an apparent omission to give the intermediate rents and profits: by a gift to one not *in esse* nothing passing immediately. It was formerly doubted, whether a devise to an infant *in ventre* was good at all: but of late it is allowed on the notion of a future devise. *Snow v. Tucker*, 1 *Sid.* 153. yet mean time it descends. If this was a use, where would it be in the mean time? Not in abeyance; for that can be only by law for necessary purposes, not by act of the party. In *Hopkins v. Hopkins*, (2), *Talbot*, notwithstanding strong words that it should accumulate, yet it was held not disposed of in the intermediate time, but resulted to the heir: who wants not, claiming always in contradiction to the intent. Here is a devise not generally to the trustees; for that might have admitted the construction contended for: but it is descriptive of a chattel, not passing the inheritance to them, the words being only a description of the land. Where an estate is given to trustees for a particular purpose without going farther, it goes to heir at law as soon as the purpose is served. This is to the trustees for life only; the inheritance and legal estate passing to the persons to take on contingency, and mean time descends; for *rest* and *residue* will not take in these surplus profits. The whole accumulating profits of the personal will go by this devise; but that arises from the sense of the word *residue* applicable to personal; not so to real estate. A gift of a personal chattel without limitation gives it absolutely; to take away which, a limitation must be added: *vice versa* in such a gift of real, which is construed only for life. Residuary legatee of personal will take a lapsed legacy; not so of the land, which would descend to the heir. *Wright v. Horn*, *C. B.* *Hill* 10 G. 1. [*Mod. Cas.* 221. cited by *Viner* as 8 and 9 *Mod.* and *Fortescue*, 182. *Pas.* 11 G. *Wright v. Hall.*] and *Goodright v. Opie*, *B. R.* [*Mod. Cas.* 123.] Although there it was not *rest* and *residue*, but *all my other lands and tenements*. Suppose a gift to *A.* for life, another part to *B.* for life, and the rest to *C.* it is doubtful whether that would have the effect of *all my estate* so as to give the fee as in *Eq. Ab.* 177. These words therefore meant only all the other parts of his estate, nor carrying the total interest as in the personal. He might in deed have given these accumulated profits to the child; but it is not said so. A different construction arises from his doing it in a case of less value *viz.* that in the greater he did not intend it; and surely if ever favour was shewn to an heir, it ought in this case of an illegitimate daughter amply provided for.

As to the lands purchased after the will, the general words are indeed

sufficient to take them in, if they amount to republication; but they do not: the codicil relating only to particular parts of his personal estate, which he revokes, not confirming the will. If a codicil [489] takes notice of the real estate, or ratifies a former will thereof; that is a republication: for it is in fact ingrafted in the codicil: but for that purpose it must relate to the real, not personal estate (1). As 1 *Roll. Ab.* 718, a writing, that *J. D.* shall be executor, is not such a republication: and 2 *Vern.* 722. *Hutton v. Simpson*, and *Cr. El.* 493, where annexing a codicil disposing of personal estate was not sufficient republication confirming the will as to the real. In *Martin v. Savage* (2), Nov. 22 1740, his Lordship determined, that since the statute, there could be no republication of a will of lands by parol declaration so as to pass after-purchased lands. *Litton v. Lady Falkland*, 3 *C. R.* and *Acherly v. Vernon, Comyns*, 381, and *Cholmondeley v. Cholmondeley*, on the late Lord's will, before Sir *Joseph Jekyl*, January 21, 1733, where a codicil revoked a devise of house, garden and estate at *Richmond*, directing it to be sold, and the money arising to purchase the freehold lands in *Cheshire*, to the same uses as directed by the will touching the residue of the personal estate: and it was held, that codicil did not pass lands purchased after the will. In *Potter v. Potter* (3), *Easter Term*, Sir *John Strange* held a codicil well executed, though perhaps the will was not laid on the table, nor executed in the presence of the will, yet it extended to lands purchased after the will and before the codicil, because it was an express ratification of the will: but he said, (though that indeed was not the question there in judgment) that if the codicil related only to personal estate, it would not have done.

LORD CHANCELLOR.

If the testator had studied to lay a foundation for all the questions that could arise on such an estate in a court of equity, he has done it effectually; for there is hardly a point upon limitations over or resulting trusts in this court but there is a foundation for it in this will some time or other. But it is not necessary to determine all at present: the questions now are three.

(r) The first is not so properly a question as matter of inquiry, relating to the copyhold estate. As to which, all such as he had the trust of the inheritance in himself, though the legal estate in names of other persons, will pass; because it has been determined, it is not necessary there should be a surrender to use of the will of such trust lands; for not having the legal estate, he could not surrender (4) (s). But that must be in a case where either by plain words or necessary intent it appears, he intended to devise his copyhold lands and here are express words devising them to trustees. But if there are any copyhold, whereof he had the legal estate, and did not surrender to use of the will, considering the [490]

(r) *Ante*, 121, 225.

(s) *Brown*, 482.

(1) Yet see *Pigott v. Waller*, contra 7 *Ves.* 98.

(2) *Barn. Rep.* Ch. 189.

(3) *Ante*, 437.

(4) *Vide ante*, 121. and *Tuffnell v. Page*, well reported *Barn. Rep.* Ch. 12, 13.
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nature of this devise they will not pass, but descend to heir at law. The master therefore must inquire if there are any such.

The next question is, as to the surplus profits; whether they are included, and to go by the devise of the residue in any way, or to be considered as part of the real estate undisposed of, and go to the heir at law; on which point the only question to determine is, whether the heir can take? For as to the subsequent question, as between any child of the daughter and the remainders over if she dies without issue, I shall reserve it. It is truly said for the heir, he wants not testator's intent, claiming contrary thereto as a strict legal right; and it makes no difference whether a legal or equitable right on a resulting trust; the heir will carry it away, if not sufficiently devised. It is rightly admitted, that all the surplus profits and interest of the personal estate will pass by the residuary devise; for there is no case, when the residue of the personal is disposed of, where the court has not held it to extend to any profits arising. It is admitted also, that he might by express words have given the surplus rents and profits, that should accrue, before the daughter had a child, or died without issue, away either to such child when born, or the person to take when she died without issue. It is plain he might; because it is to determine in the compass of a life; which is a proper time and a restriction, within which such a contingency can happen. The question then is, whether by express words or plain necessary implication of the construction of this will they are given away from the heir at law? and I am of opinion, that by plain necessary construction they are. It is pretty hard to say, that in any case, where one devises all the rest and residue of his real estate, the heir should be enabled to claim any thing out of it; for how can he claim or take these intermediate profits? He must claim as part of the real estate undisposed, not by any particular trust; which was the case of *Lord Hertford* and *Lady Carteret*, commonly called *Lord Weymouth's* case. What has the testator done? The order of the words and clauses is not material in respect of the formality, unless they put a different construction on the will. He has plainly declared an intent to dispose of his whole estate. Such a design was never shewn more plainly. Consider, what is comprised in the devise to the trustees. It is objected, that it is only a devise to them for life; but that cannot be; as that might determine, before the charge determined. But considering it as a chattel interest according to the case in *Coke's* reports till these charges satisfied, and no longer; then the devise to the children of the daughter, or for want of issue over, is not a devise of the trust, but of the legal estate in remainder after these charges satisfied, and the determination of the chattel interest: it cannot be supported as a contingent remainder; because that limitation cannot be after a term for years or chattel interest; which would be a good point for the heir at law, if that could be maintained. Whether it may be considered as an executory devise is another point. But I am of opinion, this must be considered as a trust throughout, and that the whole legal estate of the inheritance is devised to these [491] trustees (1). It has been often determined, that in devise to trustees it is not necessary, the word *heirs* should be inserted to carry the fee at law; for if the purposes of the trust cannot be satisfied

(1) 3 Burr. 1686.

without having a fee courts of law will so construe it: as in *Shaw v. Weigh*, [*Eq. Ab.*] and several other cases. Here are purposes to be answered, which by possibility (and that is sufficient) cannot be answered, without the trustees having a fee: viz. the payment of several annuities and large pecuniary legacies, if the personal estate is deficient, which will probably be the case. Then how is the rest to be raised? Barely by the annual rents and profits? It must be so, if it is a chattel interest; for then it cannot be taken out of the estate by anticipation; but that cannot be here; for if these pecuniary legacies are not paid out of the personal, the real estate must be sold to satisfy them: for several of them are to be paid within a year after testator's death, and cannot therefore be paid by annual perception. Then consider the word *arising*; it is never held to restrain to the annual rents and profits: which words include always the land, *Ivy v. Gilbert*, 2 *Wil.* 13, unless something more, as there. This then is a purpose, which it is impossible to serve, unless the trustees have the inheritance; for if they are to sell a fee, they must have a fee; nor will the court split the devise. The objection, that this is descriptive of a chattel, &c. might have weight, if there was not a personal estate also in this devise to trustees. The word *executors* therefore properly relates to the leasehold, and *assigns* to both. This then is a trust throughout in this court: and if the daughter has a child born, or dies without issue, and the estate goes over, they must come for a conveyance of the legal estate from the trustees. Then consider to what it extends; does it extend only to the lands and gross funds of the real estate, or also comprise the surplus profits thereof intermediate between death of testator and birth of a child, or dying without issue? I think the latter. If it had been said *after payment*, it might have been contended for on the words *after all these payments determined*; though perhaps that would be only playing on the words: but this is *after provision being made, &c.* after which who has testator directed shall have all the rest, &c.? Those to whom it is given on contingency; *Stephens v. Stephens*, is material to the construction of those words *rest* and *residue*. *Talb.* 288. Lord King there sent a more extensive case than ever was sent into a court of law. I have been informed, that Lord Talbot afterward expressly declared, he was of the same opinion as the judges; according to the nature of executory devise the estate should descend in mean time to the heir at law, and pass out of him on the happening of the contingency, on which the executory devise was to take place. The case is printed very correctly; and in a court of law it is determined, that where there is an executory devise in a will, *all the rest and residue* of an estate real and personal would also take in the intermediate profits of the real, so devised on contingency, which would otherwise go to the heir at law: which goes a very great way, [492] and is a strong authority as to the possibility, that such profits may be taken in by those general words, and that in a court of law; and as it is admitted, the testator may by express words do this, I do not see a material difference between the two cases, unless that it is more probable, where it is a gift to a person in being, than where to one not *in esse*: but considering the care the testator has taken to accumulate in this case, it is probable, he meant it, as in *Stephen v. Stephens*. But the case does not rest on this: though that is sufficient. There are other things plainly determining this question. I observed before, that as to the surplus interest

and profits of the personal estate, they are admitted to pass; and both real and personal being comprised in the same sweeping clause, is a strong argument against a resulting trust to the heir at law: on which Lord King laid very great weight in *Rogers v. Rogers*. Next what sense does the clause convey, by which he has directed the annuities to fall in? which he takes up in his codicil; recollecting that, as it stood, his daughter might be excluded therefrom. The annuities were to be paid only out of the rents and profits of the real so far as the personal was deficient: that part was part therefore of the rents and profits of the real taken annually out of it to pay them; the meaning was, that those annuities, which were part of the rents and profits of the rents and profits of the estate, as the lives determined, should go back to the residue, which is a plain construction put by himself on the words *rest and residue*; *Chapman v. Blisset* before Lord Talbot, *Talb.* 145. is a full authority to support the legality of this bequest: though indeed rents and profits were mentioned there. Nor is *Hopkins v. Hopkins*, *Tal.* 44. an objection against this: the court held there, that the surplus after satisfying the charges should go to the heir; but that was, because the court was of opinion, they were undisposed of. On the whole therefore, I am of opinion they must be received by the trustees, accumulated, and laid up. Then a question arises, for whose benefit; which will be between the children of the daughter, if any, and those to take in remainder if she dies without issue, and must be reserved till after the happening of the contingency. The testator's being sensible of his mistake, and inserting the children of his daughter before those in remainder, may make a strong case for them: which was the question upon which Lord Harcourt and Lord Cowper differed in *Chapman v. Blisset*; but there is no occasion to determine that; for as to heir at law none can descend.

As to the last question of the after-purchased estate? which was not, nor could be, comprised in the devise, as it stood originally? the question is, whether the codicil amounts to a republication of the will (u)? The codicil is executed according to the statute; but it is truly insisted upon, that it relates only to two personal legacies. Several cases have [498] been, where it was determined, that the execution of a codicil according to the statute of frauds shall amount to a republication of the will, so as to make the lands purchased after the will to pass. The last was *Acherly v. Vernon*, where the Lords took the opinion of the judges, who all held the codicil a republication so as to make the fee farm rents pass. The difference taken is, that there the codicil related to real estate, this merely to personal; and that though executed according to the statute, that was unnecessary: nor had he real estate under contemplation at that time. If that is determined and established, the court ought not to go further. But as to *Litton v. Lady Falkland*, it is difficult to lay weight on the report of it: for certainly one thing is mentioned there as a reason for the codicils not being a sufficient re-execution of the will, which is not law now; being directly contrary to the resolution in *Acherly v. Vernon*. It is said also, that in *Cholmondely v. Cholmondely* it was determined, that the execution of a codicil relating to personal estate was not sufficient; and that such was the opinion of the Master of the

Rolls in Potter v. Potter (1), though not strictly the determination there: but in *Acherly v. Vernon*, there is given an opinion of the judges, which seems to combat that notion, viz. that the codicil was incorporated with the will, which makes it a republication; and that reason falls in with the argument for the plaintiff the devisee: for then every codicil executed according to the statute of frauds, relating to whatever part of the estate, according to that general doctrine would be a republication of the will, and would be contrary to the doctrine cited out of *Litton's* case, and *Cholmondely's*. But it is admitted for the heir, that though a codicil only to a personal estate, yet if there is a general clause of confirmation of the will, that will make that codicil duly executed amount to a republication; because it is the same, as if he had republished every devise in the will over again. In the present codicil indeed there are not the words *I confirm my will*; but it is *I desire*, &c. between which and an actual confirmation there seems very little distinction. This indeed will make every codicil, if executed according to the statute of frauds, do, though it relates only to personal estate: for a codicil is undoubtedly a further part of the last will whether said so or not; which indeed combats with the doctrine in those cases, and what was said by the *Master of the Rolls*; and if that has been settled and determined, I should be willing to settle it there, and not carry it further; and the boundaries are so very nice, it is difficult to distinguish one from the other. But on this point I will not give a present opinion; but will search the *Register* for *Litton's* case, and desire some account of *Cholmondely's*. As to what was said relating to the annexation of the will, an inquiry would not bind: nor do I know, it will vary the case, unless at the time of the execution.

June 20th, the plaintiff's counsel informed the court, that there had been since discovered a contract for these very [494] lands before the first codicil, though not executed till after it: and by the first they indisputably pass, that relating to real estate.

LORD CHANCELLOR.

This not being proved in the cause, nor the time for performance, the proper way will be to direct the Master to inquire into the said contract, and when performed.

The contract being read *de bene esse*, Lord Chancellor said, it was before the first codicil, and went a great way to end the question. But the first codicil came before the time for execution of these articles, which was the only difficulty; for though things agreed on are looked upon as executed here, yet this is not such an agreement as could be executed at that time: the time for executing not being come: but that seems too nice: for in a contract for lands, if the party dies before the time for making the conveyance comes, and without a will, the court considers it for the benefit of the heir at law that the lands should be purchased for him: and if so, why not for a devisee? Let the Master inquire, whether there were any, and what articles or agreement in writing for purchase of these lands before the making the conveyance thereof to testator; what were the contents and time of execution of such articles, and reserve directions touching them. *Litton v. Lady Falkland* is very loose and imperfectly reported in

3 C. Rep. octavo. It is put there on the annexation, which cannot make a difference; for all codicils are by law fastened to the will; so that was a very trifling point, and *Cholmondely v. Cholmondely* must have been a cause heard by consent, as it was before term.

The counsel for the heir seemed to give it up; as in *Potter v. Potter*, the *Master of the Rolls*, and all the bar thought, that if the agreement had been in writing, it would have relation.

BAXTER v. KNOWLES, June 27, 1750.

(Reg. Lib. 1749. A. fol. 467.)

Bill for partition will lie as to tithes.
Demurrer to such a bill over-ruled.

THE bill sought a partition of tithes and casual profits in the isle of *Wight*.

Demurrer thereto: and 5 Co. cited, that there was no casual profits, and that it may be divided by writ of partition.

LORD CHANCELLOR.

[495] An ejectment will lie of tithes; of which the execution is a writ of possession; and the sheriff may do as much on partition as on a writ of possession on ejectment. This is not casual, whether tithes will rise or not. I do not doubt, but this court can divide them, as it may several things, which cannot at law. Over-rule the demurrer therefore.

SANDS v. SANDS, June 28, 1750.

(Reg. Lib. 1749. B. fol. 304.)

After leave given to bring an ejectment, a new ejectment cannot be brought without leave.

A BILL was retained for a year with liberty to bring ejectment; verdict given for defendant. Lord C. Baron *Parker*, before whom it was tried, certified, that though he did not think it a verdict against evidence, the weight of the evidence was with plaintiff. On application by plaintiff for leave to bring a new ejectment, it was granted: and verdict obtained for plaintiff, who set down the cause to be heard. Defendant let plaintiff get possession, and brought a new ejectment without leave, and moves to put off the hearing, because of the pendency of his ejectment.

LORD CHANCELLOR.

It was quite new to me, that either party should after the trial bring a new ejectment without leave of the court; the course of the court being that either party should first apply; otherwise the suit might be protracted as long as they pleased: the plaintiff might *toties quoties* prevent

dismissal of his own bill, or the defendant the hearing the equity reserved; for the court would not go on while an ejectment was depending. Yet as there is verdict against verdict, will it not be equally expeditious for plaintiff to let defendant go on with his ejectment? Therefore excuse irregularity.

ASTLEY v. POWIS, June 30, 1750.

S. C. Ante, 483.—Rate of interest (1). Charge on real estate where the court has jurisdiction, as in case of administration of assets under a charge, interest by course of the court is discretionary. Interest which has been turned into principal, carried interest at 6 per cent. until the time when the rate of interest was altered by act of parliament, but no longer, although the original principal did by virtue of a covenant. The acts varying the rate of interest do not extend to antecedent contracts.

Decree not equal to judgment to affect lands; although it is in course of administration.

THIS cause coming on again: the will appeared to be no specific devise of the real estate; but only money-legacies and annuities, and then all his manors, &c. he gives to *E. B.* his heirs and assigns for ever; making him executor and residuary legatee after all just debts are paid and satisfied.

LORD CHANCELLOR.

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THIS would charge the real estate with the legacies, if the personal was deficient; for it does not give a specific devise of any part of the real estate, but by way of residue after the annuities, &c. which shews, what was before given was out of either of those funds; and his charging the legacies on the real estate shews an intent that debts should be paid out of either fund; for legacies are to be paid subsequent to debts; and all this is one clause. Several cases have been where in one clause both should be taken *as executor*, and consequently both should be liable to debts: so that the proper construction is to take these words *after debts paid and satisfied*, as relative to and running over the whole sentence; which clearly shews the real estate is chargeable.

Then the jury, before whom the question was whether there was proof or presumption of payment from the length of time, having found that no part of this sum was paid, and that there was no laches in plaintiff in not receiving the money, there is no ground to say, that by reason of the length of time, which the jury have held excused as to the principal, the interest should not be paid.

(x) The question is, at what rate interest shall be computed? The report being confirmed, the whole sum ought to carry interest (2). I clearly thought, that if it stood barely on the report without more, the turning into principal being only the course of the court, and being a personal decree against the testator in his life, and the present bill being to affect the real

(x) 1 P. Wms. 2 Vol. 471.

(1) See *Creuse Hunter*, 2 Ves. jun. 157.

(2) But see in *Creuse v. Hunter*, 2 Ves. jun. 164-5, 169, &c.

estate, if no charge thereon the real estate could not be charged with interest of that whole sum (y); because a decree of this court is not equal to a judgment at law to affect lands, though it is in a course of administration; and therefore the lands could be affected only by the covenant in the articles; in an action on which covenant the interest would be computed only on the principal sum; and then the 6 per cent. would be carried on only on the £1000, no farther, not on the £440, for the interest could be computed only by force of the covenant for him and his heirs. But now it must be considered as a debt by force of his will, therefore they are intitled to have interest on the accumulated sum. As to what rate; it being to be computed not by agreement of parties, but by course of the court, such interest is always in the discretion of the court; and there are several instances where it has been done. At the time of the covenant, interest was at 6 per cent. and on the covenant the court cannot vary that. All these acts of parliament varying interest have not extended to antecedent contracts, only to subsequent. Then on the principal sum interest will be carried at 6 on the £1000 and also on the whole sum to the time of interest being altered by 12 *Anne*; for the report was in 1694, when the [497] common rate of interest was so. But when interest was reduced by that act of parliament to £5, and as that rate of interest on such accumulated sum, being turned into principal not by agreement but by course of the court only, is discretionary in the court, it will be computed at 6 on the £1000 principal (for that I cannot alter) but only at 5 on the £440.

(y) Talb. 222, 217. 2 P. Wms. 621.

DODDINGTON v. HALLET, July 2 1750.

(Reg. Lib. 1749. A. fol. 625.)

Vide Buxton v. Snee, Ante, 154.—The doctrine in this case as reported, “part-owners in a ship are partners, and liable *in solido*, for all goods furnished, and repairs done,” has been over-ruled, on great consideration (1).

The clear balance only to be divided as a partner's share. [See *West v. Skip*, *ante*, 239, 456.]

Where a share is assigned for valuable consideration without notice, Q. it depending on course of trade, which governs in mercantile matters.

An agreement was entered into between the plaintiffs and *Thomas Hall* empowering him to contract and agree for the building a ship for them for the service of the *East India Company*, and for the fitting out, managing, and victualling her; with a covenant (among which *Thomas Hall* was one of the subscribers) to pay proportional shares according to the several parts of the money, and all the charges and disbursements in equipping, &c.

Thomas Hall dying intestate, the part owners brought this bill against his representative, that they have a specific lien, upon what should be due to *Thomas Hall* for his share, for the money the plaintiffs had

(1) *Vide per Lord Eldon, C. in Ex parte Young*, 2 Ves. and Bea. 242, &c.

paid to the tradesman in fitting out, &c. the ship, and that the administrators of *Thomas Hall* should not run away with it as part of his general assets for all the creditors; citing *Skip v. Harwood* [Ante, 239, 456.] state where his Lordship determined, that the plaintiff had a lien on the partnership estate in respect to the balance that should come out due to him on the partnership account; and that no separate creditor of any one partner by an assignment or execution could be intitled to more than the person in whose place he stood; but could only have such as was his debtor's share, after the other partner was satisfied; which was founded on *Heydon v. Heydon*, 1 Salk. 392. 1 Sho, 173.

LORD CHANCELLOR.

This *prima facie* is like *Ryal v. Rowles* [Ante, 348, 375.]; where the Judges, who assisted me, determined; that if the money was advanced by way of a loan for a partnership-matter, there should be a lien for that.

For defendant. The selling and negotiating shares of ships is as common as of lands; and the person is considered as having a distinct property, as soon as he had got a bill of sale; and that property may be marketed: although by taking that share he does not involve himself with what went before: so that an assignee of a share in a ship is intitled, abstracted from any other account between the part-owners; having the legal property by the bill of sale, which cannot be taken [498] away by such a lien as now is insisted on. He might bring *trover*; against which no defence could be set up by such a lien; much less could *trover* be maintained thereon against such assignee having the legal property. Otherwise it would be laying an embargo on the negotiation of such shares of ships; and it would be dangerous to trade, if such assignments could not be without subjecting the purchaser to an antecedent account. This agreement is distinguishable from that of a partnership, in which each partner is liable *in solido* on account of the transaction, the interest being joint. This is a covenant severally, not jointly; there being an express provision to prevent being accountable in any other way. It is a distinct, undivided interest; such tenants are in common; not liable *in solido*, and tenants in common of shares in ships are not to be put on the foot of a partnership in trade, which is of a fluctuating stock.

LORD CHANCELLOR.

No purchaser or assignee of any share of this ship is now before me: but merely the representative of *Thomas Hall*, who was part-owner with others in the trade of this ship: and his representative is just in the same case as he would be himself; and these general creditors are in the same case; having no assignment or specific lien on his share in the ship: and the rule of determination must be exactly the same as if *Thomas Hall* himself had been before the court, and an account prayed against him. It must be admitted, the ship may be the subject of partnership as well as any thing else; the use and earnings thereof being proper subject of trade, and the letting a ship to freight as much a trade as any other. Then it appears plainly to be a partnership among them, and the ship itself to be part of the subject thereof, which was to be let to freight to the company,

it being their method of trading. The foundation of this partnership-stock is the ship itself, which must be employed, and the earnings and profits to arise. Undoubtedly all these persons subject to this agreement are liable *in solido* to the tradesmen who fitted it out; and this agreement for proportional shares is as between themselves; which is the case of all partnerships: but as to all persons furnishing goods or merchandise, or employed in work, each are liable *in solido*. So it was the instance of the brewhouse in *Harwood's* case: if it had been agreed, that that brewhouse should be part of the partnership-stock and effects (which often happen to be so) the lease of the brewhouse being used in the partnership-trade, if workmen do work on the brewhouse every partner would be liable to that, as that work was done on their property; and that brewhouse must be brought into the partnership-account; and if more was due to one partner than other, all the shares of the partnership-stock, con-

[499] sisting of the lease of the brewhouse as well as the other effects, are liable to that account (z); for in all partnerships, where more money is advanced by one partner, or even lent for a partnership-account and trade, the share must be considered as liable; for nothing must be divided as the share of the partner, but what is coming clear on the balance of the account: for when the final account comes to be made up, every thing which is the subject matter thereof, must be valued. The defendant's counsel have been forced to resort to the case of an assignment of a share for a valuable consideration; which not being the case, I will not now determine; because that is to be governed by the course of trade. If it stood on the head of general equity, I should be of opinion, that if such a purchaser had notice of the partnership, he would be subject to it; and should not doubt granting an injunction to that act of *trover*; if he had not notice, it is another thing, and a strong case for that purchaser; because he would have gained the legal interest: but if by the course of trade it is otherwise, that will prevail, and govern in this case: and the court will never extend a partnership of this kind to affect purchasers, beyond what the course of trade will do, which is to govern in mercantile matters. The court always endeavours to bring these cases within such rules; for the consequence would be, if that should not be the rule, the shares *Thomas Hall* had, according to this doctrine would be liable to all the other creditors, together with the present plaintiffs in a course of administration; so that the plaintiffs would be liable to pay the tradesmen out of their own pocket (which they are immediately) and the other creditors would run away with what the plaintiffs laid out and expended; which the court would avoid and prevent; always labouring to do that, so as always to decree a partnership for that purpose. As in *Downham v. Mathews* [*Prec. Chan.* 580.], Lord *Mucclesfield* decreed a partnership after a man's death, which would hardly have been decreed in his life; because otherwise the other creditors would run away with what was expended. What therefore shall be done on that account to *Thomas Hall's* share, must be liable to this payment to the tradesmen: if any surplus remains, that will be to defendant the administrator, as part of the general assets;

(z) Bankrupts partners paying different proportions towards the debts, shall have but one allowance, which shall be divided in the proportions their estates paid. 1 Brown, 463.

the plaintiffs having a specific lien on such share for what they have paid, or are liable to pay to the tradesmen for building and equipping the ship.

LYPET v. CARTER, July 9, 1750.

At the Rolls.

Devise of £100 to a daughter, to be paid by executor in a month after death of the widow, to whom the real estate was devised for life, and afterward to his son, the executor in fee; appointing two trustees or overseers to see the will performed. On deficiency of assets, the real charged with the £100.

(a) TESTATOR in the beginning of his will says, As to my worldly estate I dispose of as follows: gives £100 to his daughter *Susan*, which he directs to be paid by his executor to her separate use within a month after the decease of his widow, to whom he devises the real estate he had, (describing where it lay), and also the use of his household goods, [500] furniture, and stock in trade, during life: and after her decease to his son *John Carter*, his heirs and assigns for ever: appoints two trustees and overseers of his will, and desires them to see it duly performed; all the rest and residue of his goods, chattels, and personal estate not before disposed of, he gives to his son *John Carter*; making him executor.

He was the only son and heir at law; he renounced; and administration with the will annexed was taken by *Susan*; who brought this bill against him upon the personal estate's being admitted insufficient to answer the charge: and the question was, whether from any part of the will the court was warranted in construing those lands, devised to the defendant, in any respect subject or auxiliary to the payment of plaintiff's legacy.

Sir John Strange: The court, in questions of this nature, has gone a great way in endeavouring to perform the will; and though this is not the case of a debt claimed, yet it is what is said in *Peere Will.* to be a favourable case; being a portion to a child equally entitled to a provision by a father; and on the whole he seems to have intended to provide for her; but foreseeing that this could not be raised for her benefit immediately after his death, as that would break in on the provision first designed for the wife, he postponed the payment, till the fund came into possession of the son, who was to pay it, by death of the mother; so that the plaintiff should in all events have this £100, yet not till the son was in a capacity to bear it. Then see from cases cited, whether they are not as strong as the present. First *Cloudesly v. Pelham*, [1 Vern. 411.] where there is not one circumstance, from whence an intent of the testator to charge the real estate could be inferred, which does not occur here: and the court seemed to take that step, though they thought the payment of debts was designed to come only out of the personal estate: yet that the executor should not go away without doing justice to the party, the real as well as personal should be sold for payment of debts: which seems stronger than this. Next *Alcock v. Sparrowhawk*, [2 Vern. 228.] which seems to tally with the

present: the introductory words there are the same as in this; but a distinction is endeavoured, from this will's not being imperative on the executor to see the will performed, but on persons the law can take no notice of as having any interest as to the management of the estate: but that makes no difference as to the intent of testator; for in a will desiring every part of it to be performed punctually, it is not material, whether that desire is to executors or to third persons to interpose and see it carried on. Another case was *Astley v. Powis* (1), where the devise was all in one clause. *Davis v. Gardner*, 2 *Wil.* 189. is not an authority to the [501] present: on the whole then it seems to be his intent to provide effectually for every branch of his family; for if this is not the construction, it is admitted his daughter *Susan* must go without a provision.

(1) *Ante*, 483.

SEED v. BRADFORD. *July 10, 1750.*

(Reg. Lib. 1749. B. fol. 399.)

Father having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it, during the daughter's life. This held a satisfaction, and the husband not entitled.

(b) BILL by plaintiff, administrator to his wife, one of the daughters of *William Bradford*; which his daughter was intitled to a fifth part of a legacy of £520 left to her and her four sisters by the will of *Thomas Tindal* their grandfather.

The case, by which the plaintiff attempted to bring this £520 home to the hands of *Bradford*, was this: *Tindal* made the wife of *Bradford* executrix. *Bradford* as her husband possessed himself of the personal estate of *Tindal*; mixed the effects of it with his own; applied them to his own business and continued so till his death. In 1740 there was a treaty for the marriage of the plaintiff with one of his daughters; upon which *Bradford* was to give £400 as a marriage portion, as it was sworn by plaintiff's father, one of the parties to the agreement. On the wedding-day, *Bradford* went up and fetched £400 which was put by for the husband's use; one witness swearing that *Bradford* said, "there is the money, but that is not all;" another, that he said, "there is what I give my daughter, but that is not all;" and both added, "or words to that effect."

It appeared, the daughter was privy to the right she had to this fifth part: it did not appear (but rather the contrary) that her husband knew of it at that time; but he knew of it a year after the marriage; yet never made a demand of it in life of his wife, who died in 1742, nor in life of *Bradford*, who died in 1746.

For defendant was cited *Wood v. Briant* (2), 4 *March*, 1742; where administration was granted to a man during minority of his daughter, who

(b) 2 *Vern.* 484. 3 *Atk.* 76.

was intitled under the will of her grandmother to £600, as it was stated in the cause, though no account was ever made up: the daughter was afterward married to the plaintiff: her father agreed to give, and paid £800 portion, and lived six years afterward, without any demand by the husband, who after his death brought the bill against his representative for account of the personal estate of the grandmother come to his hands; and *Lord Chancellor* would not direct the account.

SIR JOHN STRANGE.

[502]

As the plaintiff knew of this right in his wife, there is no reason why he should not have made this demand during all the time the father-in-law lived after death of the wife, instead of lying by till after the death of him who was party to the transaction, and might have given some account of it, if called on. To be sure in cases of this nature there is no occasion for an express stipulation, that the £400 was given in full satisfaction of what came to the parent's hands belonging to the child, and that he does not give it absolutely out of his own pocket: but every case of this kind must be taken with the circumstances; upon which the court goes, to see whether from the nature of the transaction and demand, it is not implied that the money, thus given in the lump, included what the father gave by bounty, and also what came to his hands as belonging to the child. That is the natural transaction; and otherwise the court must suppose, he intended to give the £400 out of his own pocket, and suffer himself and his wife to remain still liable to that demand and interest. The case cited seems not to differ materially from this; the court there considered it as an implied satisfaction, though in the transaction no notice was taken of it one way or other: it not being natural to imagine he would give £800 out of his own pocket, and leave himself debtor to her for the produce of the personal estate come to his hands, for which he was accountable. The present case is stronger: for here is a certain sum: it is more natural to construe the £400 an implied satisfaction of £104, the fifth part of a legacy of £520, than there the £800 a satisfaction for an unliquidated sum of £600 which was only guessed at. The only difference is, there the father was administrator in his own right; here it was in right of the wife, executrix of the person who left the legacy: but all these effects coming to his hands, and being blended with his own, he must be considered as the father in that case, and as trustee for plaintiff's wife. All the other daughters were advanced in the same way by portions, given by him in his life; and never thought they were intitled to their share of that legacy beside; although they by their answer claim it, if the court should be of that opinion. Their acquiescence and the plaintiff's is strong evidence it never was so understood. The bill therefore must be dismissed, but without costs; for it was rather the fault of *Bradford* in not being explicit enough in telling what the £400 consisted of, as would have been prudent: therefore his estate should bear the costs.

PRYSE v. LLOYD, July 18, 1750.

(Reg. Lib. 1742. B. fol. 403—and Reg. Lib. 1750. B. fol. 644.)

See post, 2 Vol. 374. S. C.—As to a witness to a will being a creditor of testator before the act 25 Geo. II. c. 6 (1).

On a bill for establishment of a will in a case of an infant it was objected: that it appeared, on examination to the interrogatories, that a witness to the will was a creditor for a bill of fees and disbursements, and had not released.

It was insisted, that on account taken he would be found not to be a creditor.

Lord Chancellor sent it to a Master to inquire, whether he was so; and said, that *Anstey v. Downing* [Pas. 19 G. 2. 2 Stra. 1253.] was brought into the Exchequer Chamber, where there was a difference of opinion among the judges; but the parties compounding, it was not determined, so that point was still a little doubtful: and that it was going a great way to say, that if a legatee released his legacy, it should not make him a good witness.

Objected then, that the condition of the witness, as was determined by *B. R.* in that case, must be taken to be at the time of attestation; and that if interested then, he could not be a good witness.

Answered, that if the doctrine prevailed, it would overturn many wills: for in several, servants are made witnesses, who generally have legacies given them (2).

(1) See *Phipps v. Pücher*, 1 Madd. Rep. 144.

(2) It appeared on the master's special report, that the witness was not a creditor of the testator at the time of his second examination under the inquiries directed, as above; and it not appearing he was such a creditor at the time of attesting the will, the Lord Chancellor said he would not enter into a minute inquiry about that, whether he was or no. Vide 2 Vol. 374.

COLE v. GIBSON, July 18, 1750.

(Reg. Lib. 1749. A. fol. 631.)

Marriage brocage (3).

Articles before marriage to secure annuity out of wife's estate to her servant, who had influence over her: and bond for £1000 the bond delivered up; and a new grant of the annuity after marriage. The consideration of the annuity directed to be tried.

Quære, Whether a demurrer will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter, on account of plaintiff not having obtained leave of the court, and made the usual deposit (4).

Evidence.—The best to be given, the nature of the thing admits.

All deeds, &c. must be proved, unless in hands of adverse party, or destroyed; then parol evidence of contents allowed.

The court jealous of such contracts with guardian or servant.

How far they may be confirmed.

It must be such as is applied to that particular case; not barely by subsequent acts.

In 1733 on a treaty of marriage between *Philip Bennet* and *Mrs. Hal-*

(3) See *Scribblehill v. Brett*, 4 Bro. P. C. 144. octavo edit. and the note at the head of that case. Vide also ante, 177. and post, 2 Vol. 549.

(4) Vide *Mr. Beames' Orders* in Chan. p. 2.

lam, then about twenty years old, articles were entered into, to which were made parties the intended husband and wife, the defendant and Mr. *Ralph Allen*. The first clause therein was for securing an annuity of £100 to the defendant out of the wife's estate; but every other provision therein for benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by Mr. *Bennet* before the marriage to pay the defendant £1000, which bond was afterward delivered up to be cancelled; but at what particular time did not appear. A recovery was afterward suffered to the uses of the articles. In 1736 a new grant was made to the defendant of this annuity; which was continued to be paid for some time after the wife's death; but the present bill was now brought to set it aside (c).

For plaintiff. Whether plaintiff is intitled to relief against this annuity depends on two questions; whether it is not in all the [504] forms of it a marriage-brochage contract, as being the price on the sale of the lady? And if so, whether any acquiescence, payment or acts by plaintiff alone, or by plaintiff and his wife, will prevent the going into consideration of the ground of the agreement, and the giving relief? It will appear that defendant was hired at wages, and was a nursery-maid in the lady's family; and got so absolute a power and controul over her from her mother's death, and so entirely into her confidence, that she could put a negative upon any match, and had the government and disposal of her. The bond made part of the transaction, and was a bribe on the marriage; the only other consideration set up is gratitude and generosity in her mistress. Then why did not defendant stay till after the marriage? Her answer admits giving the bond; but does not remember the consideration. The principle on which the court goes, is, that the man giving these bonds cannot refuse, if he will succeed in what he goes about. If the sum to be paid on the marriage is to third persons having no influence over the party, yet it is considered as bribing them: but stronger in case of a parent, guardian, or servant having gained a confidence; because the marriage depends on it, and it was had in consequence of this. One instance among others of her influence is, her directing the servant to bring her the letters of her mistress's suitors, and telling her she should not have such and such persons. Where the relief prayed arises from personal grounds of equity from imposition, or the drawing into what was not understood or explained, subsequent acts of ratification shewing the plaintiff was fully informed, will rebut and take away the foundation. But where the relief is upon the agreements being corrupt, and such as could not be entered into, though *particeps fraudis*, the court will relieve; for such agreement shall not stand, and there is no instance, where acquiescence can sanctify an iniquitous transaction. As where usurious interest is paid for thirty years, in *Bosanquet v. Dashwood*; which being reheard, your Lordship agreed with Lord *Talbot*, *Talb.* 33. there every payment was a

(c) *Proc. Chan.* 165, 675, 522. 2 *Vern.* 588. 2 *Eq. Abr.* 187. 2 *Chan. Rep.* 176. 1 *Vern.* 412, 348. 2 *Vern.* 392. *Salk.* 158. 1 *P. Wms.* 120, 436. 2 *Vol.* 375, 264. 2 *Atk.* 535. 3 *Atk.* 566. *Ante*, 277. In these cases bonds in fraud of marriage agreement have been relieved against, but in 3 *P. Wms.* 66, such a bond was held good, as it would be injurious to a former agreement made on a valuable consideration, and prior in point of time.

ratification: yet the court, thinking it a wrong act, so that no one could debar himself from taking advantage of it, decreed, that the account should go back; gaming debts are relieved, however often ratified. If father and son clandestinely agree in fraud of the public marriage agreement, and the son makes a new deed of it every day, he could not be barred relief, though a party; for no other could have it: the court relieving for the public in general. This agreement was a gross injury to the lady, bribing the person, by whose advice she was governed, into the [505] the match; which otherwise she might not think proper, if her reason and judgment were exercised. If such a security was taken on pretence of taking an account, it would be equally bad, being only a colour: but there is no evidence of any thing due to defendant, much less a sum answerable to this annuity and the £1000, which though given up, makes part of the transaction. In *Duke Hamilton's case*, [2 *Vern.* 652. 1 *Salk.* 158. 1 *Wil.* 118.] there was no personal imposition, it being got before marriage, and in favour of the lady's mother, whose influence was presumed; and whatever was presumed there, will be proved here in respect of a common servant. The cases on this head are in *Toth.* and 1 *C. R. octavo*, and *Show. P. C. Arundel v. —*, and *Show. P. C. 76. Hall v. Potter*, and 2 *Vern.* 445, and *P. C.* 165.

Evidence for the plaintiff to prove the contents of the bond, was objected to, as never done unless where the instrument itself cannot be had; whereas it appeared from the answer read, that the bond was delivered up to plaintiff, and must be in his custody.

For plaintiff. This bill is not to be relieved against the bond; for then the objection would be good; but here it is only made use of as collateral evidence, as being part of the transaction, and to prove that it was on account of the marriage, and on no other consideration.

LORD CHANCELLOR.

The objection is founded on the proper and common rule of evidence; and in consequence the plaintiff cannot be admitted to give parol evidence of the contents of this bond, as the case at present stands. The general rule is, the best evidence should be given the nature of the thing will admit: and therefore as to all deeds, writings, and letters (*d*), they must be proved themselves unless under certain circumstances; as when shewn to be in the adverse party's hands; for then you will be permitted to prove the contents: or if shewn to be destroyed, you may then read reasonable proof of the destruction and parol evidence to the contents: which is then made the best the thing will admit (1). But, as the present case stands, the plaintiff has read, what is made evidence out of the answer, that the bond was executed, and that the defendant delivered it up to the plaintiff: which is evidence, that it is in plaintiff's custody, and to prove the contents it must be produced. A distinction is endeavoured between a bill to set aside the bond or instrument, of which parol evidence is attempted to be given, and a case wherein it is made use of only by collateral evidence; but there is no such distinction in point of evi-

(*d*) 2 Vol. 233.

(1) *Vide ante*, 387, 389.

dence; the rule being the same, whether it comes in by way of collateral evidence, or the very deed which the bill is brought to impeach. So it is in the case of letters, which are always used by way of [506] collateral, circumstantial evidence to prove the facts; no bill being ever brought to set aside letters.

For Defendant. Marriage-brochage contract is only, where money is given to procure a marriage; which on its original merits the court will never suffer: this is not so. If a lady of large fortune has contracted a friendship during infancy on the foundation of services, and tells a man, she will not marry, unless provision is made for such a person; in pursuance of which the husband and wife join to do that, which the wife said she would do; this is no contract for procuring the marriage. She often declared, that whenever she did marry, she would provide for the maintenance of defendant on account of her friendship for her. It is not a clandestine, private transaction without knowledge of the person to be procured. Husband and wife both join; so that no injury can be to a person conusant, a contracting party, privy to the whole. There is no evidence of a treaty with defendant that money should be advanced, or that there should be the marriage; nor that it was carried on with her privy or application to influence her mistress. The question here is different from that in other cases, particularly *Hall v. Potter*, where the fact was admitted, but the consequence denied: here the defendant allows the principle, if this is a marriage-brochage bond, but disputes the fact; which is the single question, and depends on the evidence on both sides. Here is sufficient to shew, whence the grant took its rise, and that it was fair and justifiable. It should be proved, that this influence was acquired unduly; or so used, when acquired: whereas there is no evidence of any communication between plaintiff and defendant to do any such office as the equity of this bill is founded on. In all instances of marriage-brochage it is a provision by the party purchasing or giving the bribe; and never so deemed where done above board, and with privy of the person; who if she had been sold, would not have been made party to the contract; being of an age to be sensible of such perfidy; which would rather have enraged her against the person procuring it. Beside the plaintiff has released to defendant.

LORD CHANCELLOR.

(c) To be sure this court has been extremely jealous of any contract of this kind made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence; (and has been justly so; nothing tending more to introduce improper matches) and by rules established, not regarding whether the match is proper or no, if brought about by a marriage-brochage contract, sets it aside; not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation: therefore though a proper match, as it was in *Hall v. Potter* (1), yet for the sake of

(c) In *Proc. Chan.* 138, such consideration was held as none. 2 *Vern.* 446. *Parl. Cas.* 76. 2 *Eq. Ab.* 585. 3 *Leon.* 411.

the mischief that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the court sets it aside; and if that was the nature of the contract, I do not know, that subsequent confirmations have been permitted to stand in the way of the relief sought. I will not say, there may not be such a confirmation or release given, as may release the remedy of the party; for it is hard to say that in a court of equity, a man having a right of action or suit to be relieved in equity, and knowing the whole of the case, may not release that, on whatever consideration it arises, so far as regards himself: but it must be applied to that particular case, doing it with his eyes open, and knowing the circumstances (1). Nothing is sufficiently shewn in this case to release and discharge that relief the plaintiff might have on the grounds of the marriage-brocage contract: there is no recital or collateral evidence that it was applied, or intended to be applied, to any right of action or suit the plaintiff might have to be relieved against this contract: and it now appears by the defendant's own shewing, on a plea put into a bill calling her to account for the money received, that she pleaded the release only to that particular relief sought by the bill that prayed an account, not as to the relief against this contract and grant of this annuity; and is therefore to be restrained, as the defendant herself has restrained it; it being common in equity to restrain a general release (f), to what was under consideration at the time of giving it: so that this release must be laid out of the case. Nor will the annuity's being granted after the marriage alter the case; for in that great authority in Lord Coventry's time of *Arundel v. —* (2), the bond for performance was given after marriage; the husband having his hands free: yet the court even so long ago did not suffer it to prevail. In these cases therefore such a sort of confirmation or subsequent acts have not been considered: nor in other cases where there is remedy on like grounds; as in private, clandestine agreements in contradiction of the public marriage agreement; as by husband to return part of his wife's fortune without the privity of his own relations; for unless something released or barred his action, the court will never suffer such subsequent acts to bar it. But notwithstanding all this be true, and the rule of the court is so, yet undoubtedly a husband or wife, or both together, may with the privity of each other at the time of the marriage, agree to give a sum of money or an annuity by way of reward to an old servant for services performed; which when done with their eyes open by both, free from any imputation or contract in respect of the marriage to be had, but barely from the motive of gratitude or generosity, the court will not interpose to set it aside. The cases of marriage-brocage bonds have been generally, where granted by one of the contracting parties without privity of the other; but if both agree to give on the marriage, no imposition can be presumed on one more than the other: though that is a pretty odd transaction to agree

[508] by the articles on the marriage so to do. But where the court does not interpose on the motive of gratitude for services performed before and long attendance, the court is to look very narrowly into

(f) 2 Vol. 310.

(1) See *Morse v. Royal*, 12 Ves. 355. Et per Lord Thurlow, C. in 1 Ves. jun. 220.

(2) *Arundel v. Trevillian*, 1 Ch. Rep. 47.

it to see, that that is the real consideration; for as it is a pretence easy to be made, and has been often, the court is to see, that it is clear of marriage-brochage, and that one consideration does not stand in place of the other. Laying all the evidence out of the case relating to the marriage-brochage, I do not like the transaction on the grant of the annuity itself: which is the very first clause in the articles, and the only part thereof not subject to power of revocation; which is a very strange transaction; for though the power is in the wife herself, she is in a very different situation after marriage, as her husband may prevail over her by good or ill usage: so that there is not a more uncertain or precarious way of settling an estate than by leaving the wife's separate estate in her power after marriage: which was the consequence of Mr. Smith's of *Essex* settling to the separate use of his two daughters. Mr. Allen, the other party to the articles, has not executed them: nor is there evidence that he knew any thing of the matter. This annuity is provided by this deed for a servant, who, it is strongly proved, had gained a very great influence over her mistress. Why did she not direct the letters to be brought to the guardian, who was then in the same house? She ought to have done it. If this had been done by a guardian on marriage of his ward under age, though he had not made himself party to the articles, but they were prepared with his privity, and one of the provisions therein was for £100 annuity to take place on that marriage, I would without any difficulty have set it aside: and it appears, this servant had gained as much authority as a guardian. Abstracted therefore from the marriage-brochage it is not to be countenanced, unless supported by better proof of the intent of both parties to make some provision for her. But how is this connected with any agreement, that can be called a marriage brochage agreement? That depends on the evidence; which is not clear, but liable to uncertainty; yet it is under very great suspicion; as it now stands before me. It appears it was the brother of defendant who introduced Mr. Bennet to this lady: it was opened, that the bond was on consideration to pay £1000 on the marriage; but that is not proved: and it must be taken, that the cancelled bond is in plaintiff's custody. But how does it stand on the answer? The not remembering the consideration induces a suspicion, for it is impossible, that the defendant, who had nothing, could have forgot the consideration of giving her £1000. If the bond was given; as plaintiff says, to pay £1000 on the marriage, and when the annuity was made secure by the recovery and declaration of the uses, the bond was given up; it would be very strong evidence of this being a marriage-brochage bond; as being given for the marriage, and afterward the annuity is granted on the bond's being given up; which will tack them both together. But if the transaction should appear to stand clear [509] of corrupt management in respect of the marriage, and the grant of the annuity proceeded from the generosity of the mistress, and with common consent, and the bond was given to secure the annuity because the mistress was under age, that may be another consideration. There is strong proof of the general influence, which may be gained by proper services, and made proper or improper use of. The defendant conceals the consideration of the bond; and so does the plaintiff; it is proper therefore to be inquired into to see, what was the consideration of the bond; which must be tried, In *Stribblehill v. Brett* [P. C. 165], it was

twice tried; and the *Lords* did a very extraordinary thing; determining contrary, and without regard to the verdicts. They must have been of opinion, the issues were directed in some improper shape; for it cannot be supposed, they set it aside as a marriage-brochage contract upon the proofs. This is not like fraud in general arising on a variety of circumstances, where it may be improper to try fraud or not fraud generally.

I will therefore direct three issues. First, whether the bond was executed in consideration of, or as a *premium* for defendant's procuring or assisting plaintiff in his marriage, or on any other, and what consideration. Second, whether the £1000 was thereby made payable at or on the marriage, or any other and what time. Third, whether the annuity or rent-charge was granted in consideration of the bond, or procuring or assisting plaintiff in his marriage, or for any other and what consideration. But if the jury shall find another consideration for the bond or annuity, or any other time for payment, let it be indorsed.

CORNWAL v WILSON, July 23, 1750.

(Reg. Lib. 1749. A. fol. 618.)

Plaintiff, a factor abroad, having exceeded the price limited for a purchase of hemp; the defendant, who objected to the contract, but afterwards reshipped, and disposed of some of it on a new risk, was ordered to account for the whole at the cost price. Factor exceeds one part, saves on another, the principal, to take the whole.

The defendant a merchant in *London*, sent orders to the plaintiffs merchants in *Riga*, as his factors to buy him some hemp at a limited price: the plaintiffs exceeds their bounds by the difference of £25. 2s. 6d. the hemp coming to *England*, the defendant refuses the contract; but however disposes of it. The question was in what manner the defendant should be accountable to plaintiffs?

LORD CHANCELLOR.

There are some things in this case very particular. It is the first case ever before me here arising between two merchants upon a contract of value, to the amount of £3000 in the whole, including commissions, insurances, and charges, to be heard on a question and dispute at [510] first of about £25, and I hope, it will be the last; they being a valuable set of men, of an advantage to the nation; running a risk for their own profit indeed, but greatly for that of the country; and it is hard they should run a risk for such trifles. Though the price was limited, there was a latitude left with regard to the freight; which the plaintiffs contract for immediately, and ship immediately for *England*; and it is proved that the captain with whom they contracted, might have had a greater freight than what he had agreed for with the plaintiffs; which if the plaintiffs had been obliged to give, it would have made about £50 difference. Defendant insists, the plaintiffs exceed their orders as factors, in which they are not warranted; so that he is justified in refusing the contract, and turning it on the plaintiffs themselves, making them principals: to prove which, merchants have been examined, as they

have been on both sides : and the result is, that if a factor has not a general, but a limited authority to purchase at a certain particular price, if he exceeds that, his principal is not bound to accept of that contract, and take those goods ; and reason agrees therewith. But it is sworn to be frequent among merchants, that where the factor exceeds a small matter, the principal does not refuse that, but takes it on himself, where there is a correspondence between them. But however what merchants think fit to do in point of good nature, or to avoid a difference with a factor long employed, that perhaps cannot make a rule among merchants : but possibly there may be something that may make a rule, if on one part of the contract a factor makes an exceeding of his orders, and on another part relating to the same goods a saving, it will be just, not only for the merchant or principal to take the whole ; but a court of equity ought also to consider it so, and it would be very mischievous if otherwise ; which is the present case ; the saving on the freight more than balancing the excess on the prime cost of the purchase. But it is said, that these things are not to be set against each other ; for that it is equally the duty of plaintiffs to get the freight at as low a rate, even if they had pursued the orders as to the price ; which indeed they ought : but that is not *ad idem*, nor an answer to the true state of the transaction on the evidence ; for the plaintiffs seeing the price of the freight was rising more than the price of the hemp was falling, had a right to take advantage of the low freight : so that if it stood singly on that between a merchant and a factor in a foreign country, the factor did right. But though I could incline to that, yet the present case turns on the latter part of the transaction, what defendant himself has done by taking these goods to himself, treating them as his own, not as factor for plaintiffs, as he would have himself considered by the custom of merchants : as to which it is sworn, (and it is very true and reasonable) that a merchant here refusing the goods sent over by his factor in a foreign country who exceeded the authority, having advanced and paid his money on these goods, may be considered as having an interest in the goods as a pledge, and may act thereon as a [511] factor for that person who broke his orders, and may therefore insure these goods, as he has done : which might be reasonable, as it was war-time. But what does he do afterward ? The time of arrival of the goods does not certainly appear ; for though *Lloyd's* list is of credit among merchants, I cannot take it as evidence of this. The defendant unshipped them : it is sworn, he acted with them as his own ; he sells them ; not by an absolute sale, but the defendant should be at the expence of transporting these goods from *London* to *Portsmouth*, and of the commission for delivering them, and of the insurance and voyage ; which is not a sale like a factor of goods for another : nor such as a factor is warranted to make ; for he should have disposed of them at *London*, the port to which the plaintiffs sent ; as he did a small part ; but it is not proved, that he endeavoured to sell the rest there, and could not. Defendant says, it lies on plaintiffs to prove, that he could dispose of them ; but it is not so. The plaintiffs could only shew, there was a market for them at *London* and a price : which has been shewn. Defendant having refused these goods, and therefore taken them as factor, for his factor, cannot run a risk therewith : that is not the law of merchants ; none of the witnesses saying so : for in shipping at a new risk, the factor, who is turned into principal, is

not bound to stand to that; for that is going a great deal farther than what the defendant complains of the plaintiffs. That he did run a risk, appears from the defendant's own insisting on insurance for the voyage, and the risk of what might be the discount on the navy-bills: which might have been run down to one knows not how much, if any misfortune had happened: and this was at the time of the rebellion, when the government was in some kind of distress. Notwithstanding defendant's letter disaffirming the contract, the subsequent acts explain the nature of the whole transaction and the intent, with which he acted; which speaks more strongly than witnesses can do: and this letter plainly shews his inclination and desire to have the goods at a lower price; and at the time of doing this it remained uncertain, whether the plaintiffs might not comply with this: in hopes of which he kept it in suspense all the time; which are not acts of a factor, but a principal. The court then is to say he meant to take them as his own, notwithstanding what he said; and he ought to account with the plaintiffs according to the price they paid. Reserve costs generally till the account is taken.

WILLIAMSON v. CODRINGTON, July [21st], 1750.

(Reg. Lib. 1749. B. fol. 577.)

Voluntary provision in trust for natural children, good against the father's representative. The estate having been sold by him for a valuable consideration, the plaintiffs were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant.

An account being directed, a deduction was made in respect of their maintenance.

As to voluntary deeds, vide *Colman v. Sarrell*, 1 Ves. jun. 50.

Bill lies for satisfaction out of assets of a voluntary debt by specialty; but if doubtful, whether action lay thereon, or damages uncertain, it will be tried at law. Defect in voluntary deed not supplied, nor specific performance (1).

If voluntary conveyance is defeated by sale, it is void as to purchaser; and no satisfaction, unless a covenant on which suit might be maintained.

Warranty in a deed construed as the subject matter.

If on voluntary settlement by father an account is directed for the child, maintenance to be deducted.

SIR *William Codrington* in 1715 made settlement of a plantation in *America*. "to have and to hold to trustees to the use of *William* and *John*, two *Mulatto* boys, whom I had by a *negro* woman, their heirs [512] and assigns for ever; they paying to another *Mulatto* boy, *Thomas*, son to another *negro*, £50 annually from the day of my death, till *Thomas* arrives at twenty one, then to pay him £500:" with a clause that he does oblige himself, his heirs, executors, and administrators (2), to warrant and for ever defend the said plantation, negroes, cattle, stock, &c.

In 1718 an ejectment is brought against him for the plantation: which he defends; but is evicted. He afterward brings an ejectment himself in his own name; but it is compounded upon 1000 guineas being paid to him for his title and conveyance of the estate.

(1) See *Colman v. Sarrell*, 1 Ves. jun. 50. 54.

(2) "*And assigns.*" R. L.

After his death, this bill was brought by *William* in his own right, and as an executor with another of his brother *John*, to have an account of the rents of the plantation, and a satisfaction for that rent received by Sir *William* in his life; and for the sum of money for which he sold and released his right, with interest from the time of receiving it; and for the produce of the negroes, horses, cattle, and other stock on the premises received by him (3).

For plaintiff. First supposing he never intended to deprive the plaintiff of the benefit of that deed. Though no children are considered as purchasers under the statute *Eliz.* in opposition to creditors, yet it is impossible to say, this is not a reasonable act in him: nor any room to object, that plaintiff is a volunteer; for so are the defendants and all claiming under the will. If the thing had not been altered, but a necessity for the plaintiff's coming into this court for relief, as if the deed was out of his hands, or to have a satisfied term out of the way where the question is after death of the ancestor it is no objection, that plaintiff is a volunteer. On a defective voluntary conveyance indeed, one can neither come against grantor or his representative for an execution (4). This provision was to take place in trust, immediately from the execution of the deed, and plaintiff is intitled to satisfaction for the value of this estate; and it was understood by Sir *William* that the profits were to be laid up for their benefit; as appears by a will he made in 1717, providing for their maintenance another way; and his last will shews, he meant to keep up the beneficial part of this provision; for there he gives *Thomas* £500 on condition that he released the other £500.

But supposing he endeavoured to disappoint this grant; plaintiff is intitled to a satisfaction out of his assets for the value of the estate so settled, which came to his hands: he having covenanted under hand and seal to make it good; which wants no other consideration. [513] An action might be maintained at law on it. It was determined solemnly by the *Lords*, *Vernon v. Vernon* (5), that a right to come for satisfaction out of assets, should intitle to specific relief: which seemed to go farther than former cases in relief for volunteers. The same question came before his *Lordship* in a case much debated, of *Fagg v. Nash* wherein the material decree was made 22d October, 1744: where the plaintiff, one of the several daughters of Sir *Robert Fagg*, claimed under marriage articles of *Robert* the son; by which the father and son covenanted to settle to the use of father for life, to son in tail, then to one of the daughters, if the father did not limit it to other uses. On a bill for specific performance, the defendants, co-heirs at law, insisted that she was a volunteer; no consideration moving from the brother; and that as to the father, it was liable to a power of revocation; his *Lordship* observed, on the authority of *Vernon v. Vernon*, that the son had bound himself by covenant, though being tenant in tail he might have barred, but had not done it: that the covenant bound the real assets of the son as well as the

(3) The bill also stated, that various negroes and their issue were removed from this plantation to others by Sir *William*, where they were afterwards wholly used and employed for his benefit. An account as to those was prayed together with the above. See p. 215, &c.

(4) Vide ante, 236.

(5) 1 Bro. P. C. 267, octavo edit.

personal, and the real assets of the father: that if an action had been brought on the covenant, they would be intitled; and that to prevent circuity was the ground of giving that specific relief.

For defendants. The defendants, executors and trustees under the last will, were strangers to the whole transaction, on which the demand is made. It was originally designed as a provision to take effect from the death of Sir *William*. The deed contains indeed a general warranty: but there is no case, where the court has considered a covenant by way of general warranty a personal covenant. This is the first instance of a gift of a general warranty on a voluntary deed: so that supposing it looked on as a covenant, yet being so extraordinary, how far should a court of equity give it aid? Had there been an actual recovery of a sum by judgment, so that it was liquidated and really due, the court might aid; but not otherwise. Suppose this a deed under any legal imperfection, as a feoffment without livery, or bargain and sale in *England* without enrolment, the court would not aid; for though one is naturally obliged to take care of his natural children, yet in *England*, in the most favourable instance, a bastard is not considered as a child; for by will under the statute of *H. 8.* a mother could not give her own *knight service* land to a bastard child: nor can one covenant to stand seised to their use. So that no assistance should be, unless this is such a covenant for which full satisfaction ought to be given. But this is a general warranty of the land; and that extends only to the title; on which only a real remedy could be had; as if they [514] were in possession, and a real action was brought against them, to intitle the tenant to the *præcipe* to vouch warrantor or his heirs, or to bring a *warrantia chartæ* to affect the lands of warrantor or his heirs: unless it was a chattel estate recovered, for which there may be personal damages. This is only to warrant as things then stood; as the warranty of a house will not oblige to rebuild, if burnt down. The court will not say, they will give the value of the land because it might come before a jury, who would give those damages. Most likely a jury would not give to the full value; for a jury is not bound to give damages *ad valorem*; and if this was not under hand and seal, nothing could be recovered on it at all, as it would be *nudum pactum*. They should therefore go to law to judge whether it is an effectual personal covenant or not.

LORD CHANCELLOR.

I do not wonder, that Lady *Codrington* thinks fit to make a stand against this demand, especially in its great extent, or that the other trustees and executors joined therein; it being incumbent on them to defend the estate in the best manner. Besides she must have some resentment against this kind of conduct in her husband. But when it comes before a court of justice, the court must consider the rights of the parties resulting from the acts done, consistent with the nature and foundation of that demand, and the jurisdiction in which the relief is sought.

The first question is with regard to the nature of the remedy the plaintiff has taken; for as to the other circumstances, certainly, though the conduct of this gentleman appears very extraordinary, yet when he had these children, in whatever way, or of whatever colour, it was a natural duty incumbent on him to provide for them: and whatever provision was

made for them, so far as they should be intitled in law or equity, the remedy must be extended for their benefit. The remedy taken is by bill for satisfaction out of assets; not insisting to follow the subject itself. Undoubtedly a bill may be for satisfaction of a debt out of assets real and personal, which debt may be created voluntarily by the testator; for though one cannot come into equity to supply a defect in a voluntary deed without consideration (1), or in many instances cannot come for specific performance of such an agreement, yet if he has a specialty, he does not want proof of consideration; but may come into equity as well as law to have satisfaction for that debt on that specialty out of assets: and then the court will not send it to law; but will judge, whether he has a specialty or not. Indeed if it appears doubtful to the court, whether it is specialty on which an action at law could be maintained, or the damages so uncertain that it could not be settled without being tried by a jury, the court will, as in other cases, have the aid of a court of law: [515] but unless such a necessity, will not send it to law to make two

suits out of one. The plaintiff is proper to have a decree, so far as his right extends: to determine which extent, the nature of the settlement, and covenant therein contained, must be considered.

I am of opinion on the whole circumstances of the case (and perhaps the court ought to take the greater latitude as it is a voluntary deed) that the true meaning was not, that this conveyance should take effect in possession in trust for these two children, but after his decease; and there are words in it, which though improperly drawn in, and perhaps in strict construction refer to another matter, to the payment to *Thomas*, yet are they such, as an ignorant person, no lawyer, might naturally think the whole was to take place after his death: and it is extraordinary to think, he should make an instrument putting the estate out of his power, and make the provision for maintenance, and the provision for another boy to commence only from the day of his death. A very small transposition of the words without any change of one of them, would make it a plain declaration of the whole trust to take place after his death; and as they are, they might very naturally have been understood so. As this is the construction, in the mean time it would be a resulting trust to himself. It is material to consider, how all the parties understood it from the time of execution of this deed. The trustees did not apprehend they had any thing to do with this plantation; Sir *William* kept possession, though let to a tenant, and the rent to run in arrear, and in mean time maintained these two children in a handsome and generous manner, considering what they were, and in some degree advanced them in the world. He alone made defence in the ejectment: the trustees, though conusant of the deed, not interfering. On eviction he brought an ejectment himself in his own name; how far that might have prevailed, if this deed had appeared, I will not say: but it shews his apprehension. The money on the composition was paid to him. He calls on the tenant for the rents: an account is made up: and therein included not only the arrears incurred from the time of the execution of this deed, but four years before. In making up that account, one of the trustees acts as attorney for him; and the money due was paid to him with privity of the trustee conusant of the deed.

(1) Vide ante, 236, and reference.

Beside he desired the plaintiff's mother to take particular care of this deed; for that it was for the *future* benefit and advantage of her children; and it is very improbable, that he should make a settlement of this plantation absolutely out of his own power in his life on these children then about five or six years old. Nor does the will in 1717 afford an argument, that he understood it in another sense. It appears, the plaintiff's mother among several other women of this sort was his favourite. He brought her to *England*; not sending her back till after he was married: and might think so fondly then of her and her children, as to intend to make an additional provision for her by his will, without regard to what he had done in his life. That was quite of a different consideration, and not contradictory to the sense I have put on this deed.

But then arises another point on the covenant; for let him intend what he will, if it is a voluntary settlement, and he has since conveyed away the estate for valuable consideration, these children or their trustees cannot recover it back from such a purchaser; for by *Statute Eliz.* (which I suppose, is taken to be law there) the purchaser must retain it against them: and if that was the whole of the case, there is no covenant of speciality to oblige Sir *William* or his estate to make it good. There is no instance, where a voluntary conveyance if afterward defeated by sale for valuable consideration, that a satisfaction can be demanded against him or his estate, unless for some covenant on which an action or suit might be maintained. Therefore plaintiff resorts to the clause, which he insists on as a covenant from Sir *William*, intitling him to satisfaction for what was lost by eviction of the estate out of his assets real and personal: and if it amounts to a covenant, it will intitle thereto. I am of opinion, it is not to be taken according to the objection for defendant as a strict warranty of the land; which would be contradictory to the words of the clause. The word *Warrant*, when properly applied, has to be sure a particular sense; but has in general a further sense: therefore it is not necessary to understand *Warranty* in a deed or covenant barely as a warranty to the title to the realty: but it shall be taken *secundum subjectam materiam*. Here are chattels to be warranted in this deed; some of which are certainly personal things, as cattle, horses, &c. though negroes in some instance are considered as annexed to the plantation. Then there are words binding his executors and administrators; which must be rejected, if to be construed as a mere real warranty of the land. The clause therefore is inconsistent with that narrow construction: nor is it penned as a real warranty; which is, "I do for myself and my heirs warrant such land;" here the words are, "I do oblige," &c. which amounts to the same as, "I covenant," &c. for many other words in a deed will amount to a covenant besides the word *covenant*; as "I oblige, agree." This then is barely a covenant for himself, heirs, executors and administrators, to warrant; which word must be construed in a larger sense than warranty in a strict legal sense; as large as *defend*. That construction must be the same in both courts; and there is no difficulty, I think, in so construing it in a court of law. I allow a jury is not bound to give damages *ad valorem*, but may mitigate according to the circumstances. But to what purpose send it to law? There is no doubt of the construction of the covenant; nor is it

for the benefit of either party to create two suits out of one. Besides I should send this to law at a greater hazard to defendant than to plaintiff, because, though I think, this is the construction on the [517] deed, and I am warranted therein from the frame, and more strongly from the sense of all the parties, yet if it comes into a court of law, by action of covenant, if it could be maintained, that court could not take in any of these considerations: so that the plaintiff, if he recovered, must recover according to strictness the profits by way of damages from that time. Then the next question is, what relief ought to be in this court? And I am of opinion, the plaintiff is intitled to relief: which is indeed agreeable to the intent: for it is plain, that by his sale he did not mean to defeat the provision he thought he had made for these children; but meant to keep up the beneficial part of it for them; as appears from the observation on his last will: wherein he makes a provision for *Thomas* in lieu of the other, but none for plaintiff and his brother, though his greatest favourites. Then what kind of relief? It is demanded very largely; to which I cannot think plaintiff intitled: even in the case of a legitimate child where a father had made a voluntary settlement, and maintained that child, not paying over the profits thereof to that child, it would be very difficult to say, that child should have an account back of these profits; which could not be done without deducting that maintenance. I must proceed by the strict rule, viz. that plaintiff should have satisfaction for the value of the plantation, as it stood at the time of the sale, and the negroes, &c. from the death of Sir *William*, according to the value at the time of the eviction, which the master must inquire into, with *English* interest on that sum, as it is considered as *sterling money*, from his death.

GRIGBY v. COX, *July 24, 1750.*

(Reg. Lib. 1749. A. fol. 647.)

Purchase from a wife of part of her separate estate (1), without her trustees joining; with a covenant by the husband, that it was free from incumbrances. *There being no proof of the husband's improper influence, although it was alleged, the purchase was effectuated; but as to the husband's covenant, the wife held not bound; and, there being an incumbrance, the plaintiff's remedy was against the husband alone.*

Wife a feme sole as to her separate estate.

Her trustees need not join, unless made necessary.

On the marriage of defendant and his wife, an estate was settled in trustees to receive the rents and profits for her sole and separate use, and as she should direct and appoint, whether sole or covert. The wife by deeds of appointment sells part to the plaintiff; and the husband covenants, that the said purchase should be free from incumbrances; but the trustees were not consulted therein.

The bill was to have the effect of this bargain; and praying, that plaintiff may be decreed to receive the rents and profits of this part of the estate free from the deduction of the mother's dower.

(1) See *Allan v. Papworth*, ante, 163. See also ante, 303, and the references.

The wife insisted (2), that plaintiff had colluded with her husband to take away that separate power from her: that plaintiff paid the money to her husband, though he saw this settlement to her separate use; therefore did not come into equity unexceptionably and on fair grounds; and that her friends and trustees ought to have been consulted.

[518] LORD CHANCELLOR.

Whatever suspicion or inclination the court has against such a transaction, yet as defendant has brought this case without any proof; it is impossible not to decree to plaintiff the purchase of this equity and trust, the benefit of this purchase as against the wife so far as purchased from her, and as against the husband so far as he has bound himself by his own contract. (g) For the rule of the court is, that where any thing is settled to the wife's separate use, she is considered as a feme sole; may appoint in what manner she pleases: and unless the joining of her trustees with her is made necessary, there is no occasion for that. And this will hold, though the act done by the wife is in some degree a transaction alone with the husband; although in that case a court of equity will have more jealousy over it: and therefore if there is any proof that the husband had any improper influence over the wife in it by ill, or even extraordinary good usage, to induce her to it, the court might set it aside; but not without that. The wife might have made an immediate appointment for benefit of her husband: which would have stood, unless some such proof as before mentioned. Then it certainly cannot be an objection against a purchaser; and if the case is free from other objections, as from the defect of proof it is, the taking the husband's covenant can be no objection. A prudent man acting very fairly and honestly, and consulting the trustees, might have reasonably insisted on a covenant from the husband, that the estate was free from incumbrances: for suppose, the wife had made a prior secret appointment, how could a purchaser be secured without a covenant of the husband? for the covenant of the wife could not have bound her, as the prior appointment would take place. A court of equity cannot say, this is wrong, unless some proof appears of ill usage or distress by the husband. I should then have great difficulty in carrying this agreement into execution, or establishing this purchase; but as it is without proof, it is impossible to say this is not a purchase.

Then as to the exoneration of this part of the lands from the mother's dower by turning it on the other part of the estate, which still is settled to the separate use of the wife, that depends on the appointment of the wife, whether she was bound by that appointment to do so: for as to the covenant by the husband that it is free from dower, that will not affect the wife; nor has plaintiff a title to that decree against her, but has a remedy against the husband. The power of the wife was under this settlement which is made subject to the dower; she being to receive the rents and profits to her separate use over and above the dower, which

[519] ran over the whole. Then if the wife made an appointment, it was only over and above the dower: the plaintiff then must rely

(g) Ante, 303. 2 Vol. 180, 75. 2 P. Wms. 144.

(2) She averred, she executed the deeds by compulsion of her husband, and for fear of losing her life if she refused. R. L.

on that covenant to indemnify, and make him satisfaction. In a case of this kind I will not go a jot further than I am obliged by the strictest rules that can be. It would have been more prudent if the purchaser had talked with the trustees about it. This sort of transaction is generally contrary to the intent; for where a feme covert is to receive rents and profits to her separate use, the friends of the wife mean not, that she shall make a sale of it, but receive it from time to time.

No costs as against the wife; it being a purchase of this kind, I cannot carry it further; but as against the husband I think the plaintiff is intitled to costs.

N. Thayer v. Gould, (1), as cited at the bar, was, money to be laid out in land to be settled to the husband for life, then to wife for life: the husband wanting the money, it was paid to him; after his death a bill was against the trustees to oblige them to refund to her, because she was not examined; and an absolute decree was issued against the trustees at the *Rolls*; but when it came before his *Lordship*, it was compounded.

(1) 1 Atk. 615, and Reg. Lib. 1739. B. fol. 152.

BARRET v. BECKFORD, July 24, 1750.

(Reg. Lib. 1749. A. fol. 619.)

Satisfaction.—Testator being under an obligation to pay an annuity to *M. P.* bequeaths the residue of his estate for the benefit of his mother and *M. P.* for life. This is not to be considered in satisfaction of the annuity.

Limitation over "after legitimate heirs" too remote, unless capable of being confined to the period of the party's death (2).

The court leans against double portions, and presumes a like or greater legacy a satisfaction. 2 *Vern.* 709.

The satisfaction should be exactly of same nature and certainty. [See *Couch v. Stratton*, 4 *Ves.* 391. 394.]

(h) J. BARRET being by the will of *James Pope*, to whom he was executor (3), to pay £300 *per ann.* to his aunt *Margaret Pope*, devises the residue of his estate to his mother and his aunt *Margaret* for life.

On a bill by the mother the question was, whether this moiety of the residue for life was not a satisfaction of that annuity.

For Plaintiff. This is a satisfaction; being more than the £300 annuity. A person, by virtue of his estate being debtor for an annuity, charges by name of residue all his estate therewith. Suppose he gives her £300 *per ann.* out of the estate of *Pope*; that would be specifically doing it; and

(h) 2 Vol. 37. 1 *Brown*, 481. *Ante*, 263, 126. 2 *Vern.* 258. *Pre. Ch.* 228, 314. 2 *P. Wms.* 553. Legacy to a child not a satisfaction of a bond to the same child, the bond being payable before the legacy. 1 *Brown*, 295. The value of a beneficial lease granted to a natural son, not a satisfaction *pro tanto* of a legacy to the son in the father's will, they not being *ejusdem generis*. 1 *Brown*, 425.

(2) See *ante*, 9. 133.

(3) And residuary legatee, R. L.

it is done in effect, though not in words. But considering it as a debt due from executor receiving assets, which he is bound to pay, supposing he had given security, or a bond for the payment personally of £300 *per ann.* and gave his residuary estate during life: that would have the same effect, as if he gave an annuity to the value out of the residue: but it is out of another fund; and can it be said to be less a debt from him, whether he himself gives a bond for it, or by receiving assets makes himself debtor for it? A sum of money to a wife has been held a satisfaction for arrears of pin-money; though only recoverable in this court. *Lee v. D'Aranda, Feb.*

1746-7, [*Ante* 1.] and *Door v. Geary, June 12, 1749, [Ante 255.]*

[520] are applicable: nor could he intend so great a disproportion between his aunt and mother, as will be, unless this is admitted a satisfaction. The intent is to make them entirely equal; and they seem joint-tenants, and a survivorship for their lives.

For Defendant. No intent is shewn, that what is given should go in satisfaction of any thing defendant is intitled to under her husband's will; therefore it has been argued from the nature of the case, wherever satisfaction is decreed, it must run on all fours: and in many cases the court has doubted, whether, if it came originally before them, they would have gone so far. It is begging the question to say, he intended them equal shares; for it is so only in the residue after discharging the burthen. Though the residue may in the event be more than sufficient to pay the annuity, it was an uncertain and precarious benefit. In the cases cited, what the executors did, was part of the performance of the contract; and the performance was out of that fund, out of which he was bound to make satisfaction, but where the former will make a fund liable, and the latter takes no notice thereof, but gives a moiety of the whole estate, there is no instance of that being a satisfaction. In construing a legacy a satisfaction, the court considers it as a debt moving from himself; as a satisfaction for the testator's covenant: but never where he is obliged to pay by reason of assets in his hands, where the debt is not due from himself.

LORD CHANCELLOR.

I am of opinion, this legacy of a moiety of the residue of his personal estate is not a satisfaction for the annuity. No case is cited of a decision in this court of a satisfaction carried to that extent, which indeed in this court has gone a great way, and in some instances has been a little regreted. But that has been on another head; where a legacy has been presumed a satisfaction for a debt by the same testator; the objection to which has been, that where one says he gives a legacy, which is supposed voluntary, it is pretty hard to say, he meant to pay a debt instead of that. But this is clear of that objection; for on the head of presumed satisfaction for a portion to children the court has gone a great way, where one is disposing of an estate among his children and his family, and is obliged to give a portion by marriage settlement, and has given a like or greater sum by will (c); the court leans against double portions or provision, tending to bring a

(c) *Ante* 316. Where portions are charged on an estate which goes to the eldest son, additional portion, on conditions, shall be like laws made after others, and shall repeal the former. Per Lord *Thurlow*, 1 *Brown*, 296. In 3 *Atk.* 66, it was held that in the case of portions, as both move from the same person, the court will overlook any little incum-

greater burthen on the heir of the family; but this is not of that kind. The cases cited are not like this in the reason of the thing. In *Lee v. D'Aranda*, if the administrator paid the residuary part, which amounted to more, it was actually a payment and performance: so the court held in *Blandy v. Widmore* (1), where the covenant was to leave; and [521] in whatever way left it was a performance; so is *Door v. Geary*. There is some kind of uncertainty in cases of presumed satisfaction in this court; and it may be difficult to reconcile every one of them. But *Duffield v. Smith*, 2 Vern. 258, is applicable: there was a difference of opinion, and the Lords were against the satisfaction; which determination goes a great way in this (k). It is a general rule of satisfactions, that the thing to be considered as a satisfaction should be exactly of the same nature, and equally certain: here it is not of the same nature. The first is a clear annuity of £300, the will a moiety of the residue of the personal estate, whether more or less: which though probably it would be more than sufficient, yet it was uncertain from accidents, if he lived longer after the will. It is said, that in this way the provision for the aunt is greater than that for the mother, which is unnatural: that will not be as moving from him; but I believe, he intended it. He owed every thing to this uncle (2), and he certainly then intended to be bountiful, to make an addition, and shew a respect to his aunt. Then no authority is to restrain it, or that the provision by the husband should be deducted out of that bounty meant by the nephews.

(l) Next a doubt was made on the will of *James Pope*, whether a limitation over was too remote and also uncertain; he having devised his full and whole estate, bank-stock, &c. to his nephew, *J. Barret*, and his legitimate heirs; if he died without legitimate heirs, then to the family of the *Popes* his relations.

LORD CHANCELLOR.

The proper construction of *legitimate heirs* is heirs of his body lawfully begotten; for if to him and his heirs lawfully begotten, that would be heirs of his body: and then the contingent limitation over would be too remote and void according to the case of *Lord Beauclerk*, unless there is something to confine it to the time of his death.

branches, as difference of the time of payment, and consider one as a satisfaction for the other; which rule was recognized by Ashhurst, Justice, in 1 Brown, 310, and according to which he decreed, that a provision by will was in part satisfaction of a portion by settlement.

(k) 2 Vol. 636. 2 Vern. 489. 2 Brown, 100.

(l) 2 Vol. 121.

(1) P. W. 324. See particularly Mr. Cox's notes on this case.

(2) Vide note (3) ante.

PEIRS v. PEIRS, July 23, 1750.

(Reg. Lib. 1750. B. fol. 97.)

Waste (1).—Father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. Injunction refused to restrain the father, who was without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow-land, &c. To ground such an injunction, there must be waste and spoliation, and no delay in applying for it.

(m) THE plaintiff brought an original bill against his father, tenant for life without impeachment of waste; to have £1000, raised and settled according to agreement; and also a supplemental bill for waste committed at a house in *Wells* by the father's pulling up a *deal floor*, and removing it to his house at *Bradley* (which was said to be like pulling down a mansion-house, as the case of *Raby Castle*) his removing some young oaks, turning meadow into plough-land; and the contrary.

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LORD CHANCELLOR.

It is very unfortunate, such an expense should be created between a father and son. The clause, *without impeachment of waste*, is generally put in to prevent disputes of this kind; but if it was so to be made use of, that a son should have it in his power to call a father into a court of equity for every alteration he makes in a walk or an avenue, though he removes the trees to another part, and so of the house, it would be such a fund for disputes between a father and son, there would be no end of it; and it would be better for the public, that *Raby Castle* had been pulled down, than that precedent had been made. It is not an immaterial circumstance for the defendant, that an injunction was never applied for, which is always done on such a bill as this; which must be maintained on the head of destruction and spoliation. Beside this floor was placed, and the trees planted, by the father himself: therefore if no more in the case, I would dismiss the supplemental bill with costs to be taxed. But on the original bill the plaintiff has an equity to have the £1000 raised and settled.

(n) If a father tenant for life, wants to raise a sum, and gets his son to join for the security, but the father receives the money, it is the debt of the father, who will be bound to exonerate the son's estate from this incumbrance; for the son will be considered as having pledged his estate for that purpose: just as if wife joins with husband in raising money on her estate, it will be considered as pledging her estate for that, and the husband is bound to exonerate it.

(m) 1 Brown, 159.

(n) Son having a remainder in fee, joins his father, tenant for life, in a mortgage to raise money for the use of the father, the mortgage not being paid off till after the father's bankruptcy, the son cannot prove his interest under the commission. 1 Brown, 384.

(1) See *Aston v. Aston*, ante, 264, and the references.

CONYNGHAM v. CONYNGHAM, July 31, 1750.

(Reg. Lib. 1749. B. fol. 635. 637.)

Rehearing, the former decree having been drawn up on defendant's *default at the hearing*. Devise of "*rents, profits and produce*" of *West India* estates to be consigned to trustees, and applied by them in disencumbering an estate in *Scotland* of debts, and also in payment of other debts, funeral expences and legacies. Held on rehearing, that such charges could only be paid *out of the annual perception of rents and profits*; and that part of the former decree, which *had directed a sale, was reversed*. A trustee, with notice of his appointment as such, interfering with the subject matter, *cannot repudiate the trust, and say he acted merely as factor or agent*.

ROBERT CONYNGHAM devised the rents and profits of his plantation, now in lease to his son, to three persons and their heirs, on certain trusts, one in *Scotland*, one in *St. Christopher's*, one in *London*.

The estate being by decree directed to be sold; the defendant *Coleman*, the *London* trustee, petitioned to rehear the cause for that reason, and next, because he was thereby made accountable for the rents and profits of the plantation, which came to him: whereas though named a trustee in the will, he never accepted it, nor acted as such, but only as agent or factor for *Daniel Conyngham*, the testator's son and heir at law; to whom he had accounted, and therefore he was not bound to account to plaintiff or any claiming under this trust. No one is bound to accept a trust against his will: this is a devise of the receipt of particular rents and profits; they were remitted, not to defendant, but to *Daniel*, who was in *England*, and put the bills of lading into the hands of defendant as his factor to dispose of them, not under the will.

LORD CHANCELLOR.

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A court of justice must wink extremely hard not to see the ground of so much opposition to the plaintiff's clear right, and the hope to take advantage of delay from the persons litigating being in different countries, and subject to different jurisdictions; and it is incumbent to lay hold, if possible, on any foundation to prevent it.

As to the first complaint, I think myself not warranted from this will to decree a sale. This happens to be sometimes attended with inconvenience; as in *Ivy v. Gilbert*, [2 Will. 13.] but I cannot go farther, unless there is some other right of incumbrances, &c. The direction therefore for sale must be left out, and instead thereof inserted, that all creditors of testator, annuitants, and legatees under the will, may come before the Master to prove their claims; for they must be paid *pari passu*, as it is to be by annual perception of rents and profits.

As to the next, if the case is as defendant insists on, he is not liable to account in this manner; but on all the circumstances, I think, the court ought to take him to have acted with notice of this trust, on the foot of it, and to account for it; otherwise it would be a very dangerous precedent: for if the court should lightly give way to what defendant insists on, the consequence would be to open a door by collusion between the heir at law, or owner of the estate subject to the charges and trusts on it, and the trustee; for the trustee might materially act and dispose of all the profits of the estate, and yet not be accountable, but the *cestui que trust* would

be turned against the heir or tenant for life though in another country. The trustee might say, he did not act as trustee, but merely as agent. To prevent this the court ought to look very narrowly into the acts of persons in that light, and see whether there is any ground to affect him with this trust. The defendant has been in a great connexion with *Daniel* (I avoid calling it collusion) and willing to do what was most favourable for him. There is a plain admission of notice of the will; which, if it amounts not to a devise to those three persons, I know not how to construe it. It is admitted, a devise of the rents and profits of land is a devise of land; but this is said to be a devise of a particular rent. Suppose a will describes it as a particular rent, or profits of a particular estate, and suppose it is mistaken therein; as if here was no such lease to the son; is there an authority, that this direction will not amount to a devise of the rents and profits, such as they are? But whether here is an express devise of the land, or only a power and authority, still it is a trust for defendant for this purpose; who having notice of this will and plain-
 [524] tiffs claim, and the whole coming in his hands by the delivery over of the very person who was to have remitted the produce to him nominally, it was incumbent upon him, if he would not have acted as trustee, to have refused, and not, going on in this ambiguous way, to leave himself at liberty to say he acts as trustee or not. Instead of this he goes on receiving the produce; on this foundation he is directed to account; and I will hold to it, and not leave him out of this decree, when he has acted thus merely to put the plaintiff to difficulty in coming at his right. Having notice of the will and plaintiff's demand, and substantially done the directions of the will as far as could be, in receiving from the hands of *Daniel*, without telling him that he renounced the trust, it would be very dangerous to discharge him, and leave the plaintiff to pursue a remedy I know not where.

GARTH v. SIR JOHN HIND COTTON, *July 1750, [and February 1753.]*

(Reg. Lib. 1752. A. fol. 240.)

S. C. 3 Atk. 751. 1 Dick. 183. Et vide post 546.—Waste.—Timber.—Tenant for life.—Tenant for years &c. without impeachment of waste.—Tenant in tail and reversioner. Rights, powers and duties of trustees to preserve contingent remainders. Tenant for ninety-nine years, if he should so long live, “without impeachment of waste, except voluntary waste,” with remainder to trustees to preserve, &c. then to his first son in tail, with the reversion to *A.* in fee. The tenant for life having no son for a long while, sells timber, and divides the profits with *A.* the reversioner by agreement between themselves. The former has afterwards a son. That son as owner of the inheritance entitled to recover what *A.* so received. (1).

(o) *MR. GARTH* tenant for ninety-nine years, if he so long live, without impeachment of waste, excepting voluntary waste, remainder to trustees during his life to preserve contingent remainders, remainder to his first

(e) 3 Atk. 751, S. C. 2 Eq. Ab. 759. Ante, 264, 476. 1 Eq. Ab. 400.

(1) See the report continued, post, 546.

and every other son in tail, remainder to defendant Sir *John Hind Cotton* in fee: *Garth* having been long married without having children, enters into an agreement with defendant to cut down timber on the estate, and divide the profits between them. He has afterward a son by another wife, who after his father's death, when of age, and having suffered a recovery, brings this bill to oblige defendant to refund £1000 received by him as his share of the money arising by sale of timber, with interest.

For plaintiff. There is no particular precedent exactly, as the case stands; therefore it must depend on general principles. The question is whether they had a right to cut timber? And if not, whether the plaintiff thereby is injured; which is necessary for plaintiff to shew, and that defendant at time of doing it was wilfully guilty of an injury to plaintiff, that is, the unborn children of *Garth*; for if this is a damage without an injury, the court will not give satisfaction.

The trustees were to preserve the contingent uses of every thing, that was settled. To avoid a perpetuity was this method of preserving estates in families a certain time by inserting trustees; which (said to be invented by Lord Keeper *Bridgman*) has been since extended by a court of equity. If trustees joined, the court would make them liable for a breach (1). It was by some conveyancers doubted whether the trustees joining could bar; which came first in *Pye v. George*, where Lord *Harcourt* said, that destroying contingent remain- [525] ders was a wrong, and that he would make a precedent if there was none. That precedent was afterward solemnly made in *Mansel v. Mansel*, where a court of equity went farther than ever, holding a purchaser to be a trustee for a contingent remainder-man. Every one doing it with notice is affected with the trust: and if the estate is got into such hands as to be followed in equity, the court would make the trustees liable for the breach. Thus it is on inheritances of land: a tree growing on the estate is as much part of the inheritance as a house or the land, and as to the person interested, selling the timber is as much to the destruction of his inheritance as selling the land. Though no remedy at law, the trustees might have complained in equity, that they were to preserve the contingent remainders which might be *in esse* perhaps in a year, and that the court should not suffer the present tenant for life to be guilty of that permissive waste, because it is a prejudice to one who may be *in esse*, and was intended by donor to have that, which is *in esse*. Though no precedent for this, yet in many cases will the court prohibit waste, though no action of waste lies. If then the court would do so, as being a wrong, the trustees neglecting their duty, or not knowing it, will not alter the case so as to prevent that satisfaction consequential to an injury.

LORD CHANCELLOR.

I know no case, where the trustees might bring such bill: though I have heard it said they might; and if this is so in case of a donee, it might be so in case of a purchaser.

For plaintiff. In case of a purchaser it would be contrary to common justice if the trustees might not bring such bill; for then a man might immediately destroy the settlement he had made. Several injunctions

(1) Vide 10 Ves. 278, 279.

have been granted, where no action of waste could be; as in case of an intermediate estate for life: *Mo.* 554, where it appears, he in remainder could have an injunction so long ago as the time of *R. 2.* for waste by the first tenant for life, as being an injury to his inheritance, taking away part of the value thereof. It is also an injury to the intermediate remainder for life, and as it takes away the benefit of the shade; so that on bill by either, the court would interpose, and not say, you may bring *trover*; but would prevent the injury. Had this been the case of an infant *in ventre sa mere* intitled to the inheritance, undoubtedly a bill would lie, though he cannot bring an action, ejectment, or *trover*, notwithstanding he may be vouched. *Musgrave v. Parry*, 2 *Vern.* 711. Then there is no reason but that a person, who may come *in esse*, should have the same equity as one, who has a being of a month, if it may be so called. [See *Stansfield v. Habergham*, 10 *Ves.* 273. 2d edit.] In *Abraham v. Bubb* 2 *Sho.* 69 (1), (though a book of no authority) is cited a case called *Lady Evelyn's* not reported in print, but in Lord *Nottingham's* manuscript; [526] where it was said, that where tenant for life, remainder to the first son for life without impeachment of waste, remainder over, the first son by leave of tenant for life comes on the land, and sells the trees, he was enjoined in this court by Lord *Nottingham*; though there could be no action at law (2). A bill may be brought by the patron of a living to prevent incumbent from cutting down timber; though the interest the patron has is very little, nor any remedy in point of law: as he cannot enter, or seize the timber: but from his remote interest in the thing in possession the court will relieve, because the law does not effectually, and will not say, that you may go to the Bishop. In *Fleming v. Fleming*, July 19, 1744, *Bishop of Carlisle's* case, tenant for 99 years if he so long live, remainder to trustees, to support contingent remainders, remainder to another for 99 years, if he so long live, without impeachment of waste, remainder to his sons successively in tail-male, remainders over; both tenants for 99 years, thinking they had an interest together to cut down, because the second had a right to do so if in possession, agreed to sell the timber and divide the profits, as here: on motion for injunction, your Lordship granted it: holding that there was no remedy at law: and that the privilege of *without impeachment* must be considered as annexed to the estate, when it comes into possession. In *Litton v. Robinson* (3), 12 *December*, 1744: testator devised an estate to his eldest son and his heirs; and if he should not live to attain twenty-one leaving no issue, devises it to his eldest daughter, and the heirs of her body; remainder to his two other daughters successively in tail; the children were all infants: the son within two years of twenty-one, petitioned to cut down timber, being for his benefit, as owner of the inheritance though subject to that contingent interest to his sisters: your Lordship refused it; but left him to do what he could according to law: upon that the parties agreed, that some small timber should be cut down, and then a bill should be brought by the daughters upon their contingent interest to prevent the waste; which was done: and though that was a remote and improbable contingency, the

(1) And 2 *Freem.* 55.

(2) Vide in *Aston v. Aston*, ante, 264 and 396.

(3) 3 *Atk.* 209. See Mr. *Sanders'* edit. which notices a difference between the report there and *S. C.* in 8 *Vin. Ab.* 475. See also 10 *Ves.* 276, 282.

court thought, the felling timber should be stayed; not that the defendant could not do it in point of law: for he had an estate of inheritance; and every such estate carries a right to cut timber; yet did the court restrain him, and said, that if an estate descended to an heir at law, where an executory devise was depending, that heir, notwithstanding he would have the legal estate of inheritance in the mean time, till the contingency happens, shall not be suffered, for the sake of those persons who may come to be interested to fell in the mean time. But the defendant is not tenant in tail in possession; and therefore could not do it, though no son was born at the time. It was not a remote contingency; and it was determined in *Lewis Bowles's* case, [11 Co. 79.] that if a son is born, the estate shall open. If then there might have been that preventative remedy by injunction, there ought to be this compensating remedy supposing the act done. But it may be said, though *fieri non debuit, factum valet*; for that by the severing the property it vested in defendant as tenant in fee. If severed by act of God, as in the case of *Welbeck park*, [2 Wil. 241.] where timber blown down on the Duke of Newcastle's estate, it would be so from the rule of law, which says, that a tree lying on the ground shall not be in abeyance, but go to the first owner of the inheritance who might maintain *trover* for it: but this is not so severed; for they knowingly contrive the injury. If allowed, it will be in the power and the interest of tenant for life to bargain with a remainder-man though ever so remote, by giving something he could not be intitled to at all; which would encourage these collusive agreements (*p*). So one made tenant for life on his marriage, reversion to himself in fee, being intitled to all windfalls, might immediately strip the estate. There is no acquiescence or length of time here; which might amount to waiver of right, or afford presumption of evidence in doubtful cases; but the plaintiff was not born till ten years after; not being of age till 1745, and pursued it recently. There is no difficulty on defendant in point of evidence from length of time; but if there was, he must have seen it could not have arisen till at a distance.

For defendant.—This is a new case; and as admitted, not well founded on law, so neither is it in equity. Defendant on application by plaintiff's father agreed, provided reasonable satisfaction was made to him, not to take the advantage of felling the timber, which he might; the bill then is not proper against him without the representative of the father. At law no writ of prohibition or action of waste lay against tenant for life or years, as the parties must provide for that; since the statute of *Glocester* indeed it is otherwise. But to whom could defendant be responsible? Not to the plaintiff had he been born; for in point of law, if he was a stranger (as a remainder-man in fee is as to privity between him and tenant in tail) he was liable only to lessee for life or years, who was responsible only to the person having a right to bring the action of waste; and remedy was left over against the stranger; against whom the action of waste could not be brought; as held by Lord Coke. Next, this is a personal tort, which dies with the party, who alone was liable; then it would be extraordinary, if the representative of the party committing waste should not be liable, then the defendant (who was never liable to the person,

who could bring the action, nor even to the lessee for life or years, if living, as the waste was with his consent) should now account for that waste. It is admitted, that if blown down or cut without concurrence of defendant he would be intitled to the benefit of the whole; how then is it the act of defendant? It is singly the act of lessee for life. Suppose the lessee had given defendant so much money not to take the benefit of it: he [528] might have done it for a consideration, or for none at all; for why may not one renounce a right? And this amounts to the same. Though this court will interpose to prevent waste, yet never where the estate has ceased in the person committing it. In *Jesus College v. Bloom* (1). 19 November, 1745, the plaintiffs had made a new lease to another; and, discovering afterward that the former lessee had cut down timber, and committed waste, brought a bill against him for account thereof: your Lordship dismissed it: for that where a lease determined, and possession was quitted, the court will not decree an account; though where the lease continues, it would decree an account of waste as incidental to that jurisdiction the court has, to prohibit and enjoin it. As soon as severed, the property belonged to defendant, who might have seised it, or brought an action without seising; for the father certainly had no other property than a special interest in the trees, while they continued annexed.

LORD CHANCELLOR.

Suppose the trustees had been vigilant, and brought a bill to stay this waste, and prayed an account of the timber so felled under this agreement; I think, that would be a proper bill: and if the court had made a decree, there would be an injunction to stay the waste; and, incident to that, the court may decree an account of the waste already committed: what would the court have directed to be done with the money raised by the timber sold (2)?

For defendant. The money even by the aid of this court would be decreed to defendant. *Udall v. Udall, Allyn*, 81, and several other cases shews that the very cutting vests the property in the first owner of the inheritance. If there had been an intermediate vested remainder for life, it would make no difference; for the defendant might then have seised, or brought *trover*, though not an action of waste; and after death of the intermediate tenant might have brought *waste* for the waste in life of that tenant. But it has never been determined, that the intermediate estate of the trustees should bar the remainder in fee from an action of waste, or take away a legal right; which, it is admitted, that would not do, if they were blown down. This estate in trustees took rise on political considerations in the time of the civil wars to prevent any act wrongfully done to put a period to the estate: and being created to one particular purpose, should not be wrested to another, or take away a remedy given to the owner of the inheritance by the statute. If the remainder-man in fee by action of waste recovers the place wasted, the remainder coming in issue cannot recover this estate vested; as held in the case of *Lincoln College*.

(1) 3 Aik. 282.

(2) See *Bewick v. Whitfield*. 2 P. W. 241 and 3 P. W. 267, 8. with Mr. Cox's note to the 5th edit. 3 Vol. 268. *Quod nota.*

This court will indeed under particular circumstances at the instance of trustees hearken to complaints by them; and has gone so far in *Mansel v. Mansel* (1) as to declare, what its sentiments would [529] be in case of a breach of trust, where the trustees joined; but suppose they had joined and been parties to these articles; they would not have made the legal right of the parties in the timber when cut, different; but they did not join, nor file such bill to stay waste; and there is no instance, where the court ever interposed on their omitting to act. If by such omission a benefit accrued to another, the court never interposes to take it away, there being instances to the contrary: as in *Partridge v. Pawlet* (2), *Hil. Vac. 1786*, before your Lordship, where plaintiff's wife tenant for life without impeachment of waste, being a sickly person, was going to cut down timber, to the produce of which she would be intitled; a bill was filled on behalf of her sister to restrain her, for that the estate was subject to debts in aid of the personal, which would probably not be sufficient for that; the court granted the injunction (3). But, there being no deficiency in the personal, a question arose after the wife's death between her husband and administrator and the sister, at whose instance the injunction was obtained upon an untrue suggestion, whether the estate should be put into the same condition, as if no such injunction had been granted? The court expressed an inclination to do so, if it could; but though it was a very hard case, and a misfortune happening by act of the court taking away a power annexed to the tenant for life, yet as an interest was by that means attached in a third person, the court did not think itself impowered to take away that right. Then much less will the court, where by the non-opposition of the trustees, a benefit accrues to a third person. *Whitfield v. Bewick*, [2 Will. 240. 3 Will. 267.] is a little defectively reported (4). It seems there as if there were trustees to preserve, &c. and if there were, that case is a direct authority.

LORD CHANCELLOR.

Partridge v. Pawlet, is not applicable to the present case.

This is of the first impression; of great consequence and importance in point of precedent: therefore I will take time to consider of it [See post, 546.]

(1) 2 P. W. 678.

(2) 1 Atk. 467.

(3) Besides the references, ante, see *Lansdown v. Lansdown*, 1 Madd. Rep. 118.

(4) Not merely so, but totally mistaken. See Mr. Cox's note to the 5th edit. of P. W. 3 Vol. 248.

PARKER v. PHILIPS, August 1, 1750.

[530]

(Reg. Lib. 1749. B. fol. 433.)

At the Rolls.

Bill for a strict settlement after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed.

EDMOND PARKER in 1679, being seized of a very large real estate, on

the marriage of his eldest son *George*, and in consideration of a marriage-portion he was to receive, settles his paternal estate to use of himself for life; remainder to trustees for two hundred years; remainder to *George* and the heirs-male of the body of him and his wife; with several remainders over. The trust of the term was declared to be after death of *Edmond*, that the trustees should raise £1500 by the profits of fines, and pay £500 in six months, and the £1000 in twelve months, to such person as he should by his will appoint; and if no appointment, the term to be void.

He had another son *Thomas*, on whose marriage he advanced him £3000, which was afterward laid out by *Thomas* in purchase of lands.

In 1680, *Edmond* made his will; directing the £1500 to be raised and distributed, as to £600 part thereof (which alone was material to the present question) to be paid to *Thomas* within three years of his, the testator's decease, and his (*Thomas*) settlement of the lands, (mentioning them by name) purchased by *Thomas*, on the heirs-male of his body, and in default of such issue on the right heir-male of him the testator.

Edmond died in 1691; the money not being due till three years, £400 part of it was paid then to *Thomas*; and a receipt now produced, signed by him, acknowledging the receipt thereof in part of the £600 given him by his father in his will. In 1700 the other £200 was paid; and then a receipt taken of £200 from his brother *George*, which with £400 received before was in full of the legacy of £600 given by his father's will.

Thomas married about 1676; and had issue male and female; and the issue male was proved to have existed till about 1705, and then failed. *Thomas* did not die till 1742; *George* survived him about six months.

The eldest son of *George* brought this bill against the co-heirs of *Thomas* to have this settlement carried into execution; by which he would be intitled according to the directions of the will as right heir-male of the testator; which he was, as well as heir male of his father.

[531] There was no evidence that *Thomas* ever offered to make the settlement, or of his being called on to do it.

For plaintiff. If a bill had been brought to have this settlement made at the time the £600 was payable, a court of equity would have made a strict settlement, that appearing the testator's intent; for wherever it arises on a will directory of a settlement to be made, though the will is conceived in the terms it is at present, the court will direct a strict settlement, if testator intended it. Then it would have been to *George* for life; remainder to his first and every other son; and the long acquiescence of tenant for life will not bind the remainder. Testator intended the eldest line of his family should be purchasers of this estate under the terms and condition in the will, which is a condition precedent; and on condition of performing that, is the £600 taken; as the receipts shew. The £600 came out of *George*'s estate; which was as much lessened, as the other estate was advantaged thereby.

For defendant. Although the method of strict settlement was first introduced by Sir Orlando Bridgman, it was not much known till some

time afterward about Lord *Harcourt's* time : so that these last fifty years in marriage articles (which are very different from a will ; being made in consideration of marriage, and a provision for children) the words *heirs of the body* have been carried into execution in strict settlement because it was thought odd to give the husband a power of destroying the settlement absolutely ; but here, it being done twenty years before, when that method was little known, it could not be intended. The court has gone a step further : carrying it into execution in strict settlement in case of a trust for a man for life, and afterward for heirs of his body ; but never farther. For there is no instance in case of a will of a limitation for life, and afterward to heirs of his body that a court of equity has determined it to be any thing but an estate-tail, where not of a trust-estate. *Bale v. Coleman*, 2 *Vern.* 670, and 1 *Will.* 142, has been allowed by every Lord Chancellor since, and particularly by Lord *Hardwicke* in *Bagshaw v. Spencer* [Ante, 150.] where his reasoning turned the other way, and determined to be only an estate for life upon its being a trust ; distinguishing it from a will where no trust. If then an estate tail would have been made according to the words of this will, if a bill had been brought for a settlement, a court of equity, which does not care *quieta movere*, will not after a long acquiescence, and lying by fifty years seeking the benefit of this contingency, suffer an estate to be disturbed, when this might have been cut off. As to the condition, it is either to prevent an estate's vesting, or to divest an estate : and it does indeed seem a condition precedent : but every condition is to be taken strictly. *Latch.* 40, 2. *Leo.* 335, so that on bond to do an act executer is not obliged to do it, because it is [532] personal. There was no obligation to pay the £600 till the act was done : and the not doing it is an evidence it was never intended to be done, and because it was of no use ; for there can be no pretence that this pittance should be settled in a more strict manner than the bulk of the estate. Nor did *George* think he had a right to demand this settlement to be made ; for when the plaintiff a little before the death of *Thomas* told *George* he had got a copy of his grand-father's will, by which the plaintiff would be intitled to his estate, *George* said no, for that his uncle was tenant in fee of that, having purchased it to him and his heirs.

SIR JOHN STRANGE.

This is a case of a very extraordinary nature : and if the plaintiff is intitled, the court will relieve ; but will not lend assistance, unless such title appears. The sum to be raised by the trust-term was not to be distributed among children ; but it was a general power to charge the estate therewith. Though this estate was purchased with money advanced by *Edward*, it appears not that ever any settlement of it was made by *Thomas* ; and it looks as if understood in the family that no settlement was made ; because by the will on which the question arises, the father put terms on his son : which he could not if the estate had been under settlement before : but he considered it as in his power at that time. It does not appear either way as to the terms mentioned in the will : there being no evidence that *Thomas* ever offered to make the settlement, or of his being called on to do it. To judge on the whole circumstances of the case other matters are introduced, and evidence laid before the court giving an account of the situation of this family during the several periods. There being issue-male of the body of *Thomas* at

the time of the payment of the money, it is probably accounted for, why no demand of the settlement was made, while that issue subsisted: but not so probably, that it would not have been set up afterward, on failure of the issue-male if proper to be insisted on.

First as to the construction to be put on the will, on the condition or proviso for settlement of land. Suppose at the time the money was to be paid by *George* he had insisted, as he might, on the settlement being actually made before he had advanced the money; so that they had been adversary, and *Thomas* forced to come into this court for the payment; the court would not have decreed it without performing the terms of the will; and as this will is penned, would never have considered it a proper execution for *Thomas* to have made himself tenant in tail directly: because by the words he is not to settle it to himself and the heirs-male of his body, which differs it from all the cases cited: there [533] being no provision at all of what sort of estate he should have himself: therefore he cannot be said to perform that condition by making himself tenant in tail, by which he might immediately have cut off the heirs-male of his body; so that to have settled it effectually he could only have interposed his own estate for life; because during his life it could not be known who would be heirs-male of his body; but that would be all. But on the next provision I cannot think with the plaintiff, that *George* under this will should be made only tenant for life. It is to the right heirs-male of him the testator: but *George* and his issue were not particularly in view at that time. In the settlement *Edmond* himself made he had not made *George* for life, remainder to his first and every other son, but tenant in tail, remainder over to the other brothers in the same manner; and had a mind to connect this to the rest of the estate, which would have been the settlement the court would have directed, had this been litigated at the time the £600 was payable or demandable.

Then as to the acquiescence of *George* from the death of his father and payment of the money; supposing him tenant in tail; for if he had only an estate for life, no acquiescence of his could bind his issue. There was no occasion to point out *George* or any other, but let the remainder fall where it would. If *George* was intitled to have called for that settlement, and never thought proper to do it, (which, while issue-male subsisted, is accounted for; as they might on coming of age have suffered a recovery, and barred the remainder to right heirs of *Edmond*), his not setting it up afterward on failure of issue-male shews, he understood that this estate notwithstanding the receipt of the £600 was to remain in the family of *Thomas*, and as a provision to be disposed of by him for the rest of his family as he should think proper: and that he understood it so, appears from his answer to the plaintiff; which he never would have made, if he ever intended to have it set up. The length of time is indeed very material; and it would be of very mischievous consequence, if a demand of this nature at such a distance, which plaintiff's ancestor never insisted on, but seemed to have waved, should be allowed to the total disinheritance of every other branch of the family: there being no other provision if stripped of this estate, for which the bill is brought. The court cannot indeed weigh the propriety of demands of this nature, and say, it is hard to strip a person of that little by one who has a great estate. If a clear right, it

must depend on the honour and conscience of the person making the demand: but the only use I make of it, is, that it induces me to think; this was from the circumstances of the family waved, and probably out of compassion to his brother.

It is too hard therefore to decree this for the plaintiff, who [534] comes now, after it is impossible to bar it: much less will I decree the £600 to be repaid. So that the bill must be dismissed (1).

(1) *But without costs.* R. L.

ATTORNEY-GENERAL v. WHORWOOD, August 2, 1750.

WHORWOOD v. UNIVERSITY COLLEGE, OXFORD.

(Reg. Lib. 1749. A. fol. 652.)

Devise to a college not for academical or collegiate purposes, but merely to make testator's house unalienable, and that one of the fellows should live in it for ever. Lord *Hardwicke* first thought it questionable whether this was a charity under the 43d of *Elis.* and whether a good devise under the mortmain act; and it was afterward determined to be void. Right of the crown to direct the uses of an improper charity (1).

Baron and feme. Husband receiving proceeds of a sale of wife's estate, and promising by a note or receipt to lay it out, pursuant to trusts relative to other property; this note held evidence of the agreement antecedent to the sale, and estates purchased afterwards by the husband were held to be bound.

Pleading.—Interrogating part of a bill must be supported by a substantive charge (2).

Exceptions. Voluntary deeds good against representatives, if they amount to a complete conveyance or transfer.

If husband can lay hold of wife's estate without aid of equity, he is not compelled to settle it, otherwise where he cannot (3).

Pleading.—Charge and interrogatories of a bill.

Voluntary agreement by husband, good against his executors, though not against creditors.

Purchase of copyholds not generally considered as a performance of a covenant to purchase and settle lands.

CAPTAIN Thomas Whorwood on his marriage with a daughter of Sir *Nicholas Waite*, being to receive a large portion with her agreed, that it should be settled for her benefit for life; and afterward, if no children, it was to come to himself. Afterward on the death of a sister, an accession of fortune came to her, to arise by sale of her father's estate; which was vested in trustees, who were to raise certain sums of money out of the estate, and afterward to divide the residue among his three daughters. She joined in levying fine for a sale of this estate. *Henry Halsey*, a trustee in the marriage-articles, and who had married the third daughter, acted in the sale, and received the whole purchase money: not only his wife's share, but that of Mrs. *Whorwood*. Captain *Whorwood* gave a receipt to *Halsey* for his part of the purchase money paid for the estate; which he thereby promised and agreed to lay out pursuant to the trust reposed in *Halsey*.

By his last will he devised the remainder of his real and personal estate

(1) See *Moggridge v. Thackwell*, 7 Ves. 36, and the cases there commented on.

(2) See post, 538. Mitf. 46. and 6 Ves. 62.

(3) See 1 Fenb. Tr. Eq. 95, 96. also 10 Ves. 90.

to the college; and by a codicil annexed particular regulations, viz. (1) that if there be a senior fellow of the college, who must be a divine, of the age of forty, in all respects of good repute, he shall be the possessor of all his estate, and furniture of his house at *Denton*, to keep it in repair; not to fell timber without consent of the college; to live in his house hospitably; and sometimes give entertainment to the poor; to distribute cordials and drugs to them, when needful; to give to them some books and pamphlets of good morals and piety; and to give an annual entertainment to the fellows: if he prove dissolute, then the election to be void, another and proceeded to.

On the information at relation of the college it was argued that a devise to a college generally is always considered in this court as a proper charitable disposition; because they are bodies of universal extent and benefit to mankind: it was therefore on the most valuable consideration. What followed, were only regulations by the testator, in which, if any difficulty, they might be settled by proper authority; and though some of them should be absurd, that would not make the devise to the college void. The direction for taking care of the poor, being confined to a particular district, is not like Colonel *Norton's* will; which was to take care of the poor and lame, halt and blind, in general. But this being now [535] established to be a valid will in point of law, the particular directions and regulations will not make it void.

Against this it was insisted, this was no devise to a charity, or to a superstitious use. If this is to be established, it is, as this court represents the crown; on which this application is made to give an approbation of this charity under testators regulations. Is this such a sort of use, as ought to be established by a court of equity for ever? The 43 *Eliz. c. 4.* has made good devises to colleges upon an encouragement for learning; if this is a devise of that nature, it would be within that statute, which has defined what shall be a charitable use. Though some uses not exactly within those words have been determined within the statute; as the leaving money, or an estate for maintenance of a preacher (which from its own nature is so, as for the propagation of religion), yet are they very few; for other purposes have been endeavoured to be brought within it, which have been refused; 2 *Vern.* 487, and some uses that were indifferent in themselves, or for benefit of mankind in general: 2 *Salk.* 605. Though this is to the college, and the estate vests in it, it is not for the benefit thereof in general as a body, but for particular purposes in the annexation to his codicil, which he calls his regulations; which is only giving his estate in *mortmain* to a person to live on it in the manner the owner should have done. The duty is to be beneficial to the poor in some, not in any certain degree. To live hospitably is the duty of every one, who has a good estate. He is to continue still a senior fellow, nor to do any act which shall avoid his fellowship. In this college celibacy is required, and residence; whereas the nature of this institution is to draw him from the college; which is not for the benefit of learning within the

(1) "The codicil directed, that the college should never sell, change, or otherwise alienate, the donation of the manor of *Denton*, or any part of the lands and tenements there- to belonging, from the purposes intended; which were, that if there should be a senior fellow," &c. &c. (as in the report.) One of the purposes was, "to give entertainment to the poor and needy from the adjacent parts." The bequest was afterwards declared void by Lord *Northampton, C.*

statute of *Eliz.* nor has it any tendency to religion. The only thing, having a turn towards charity, is the entertainment of the poor; which is not an act of charity, (although relieving their necessities is), but rather luxury: besides it is only to be done sometimes, quite unlimited. The adding a tincture of charity merely to make that good which otherwise would be void, will not do. There is indeed a clause in this will, which might be interpreted to be a devise of the advowson of the college, and the estate given in augmentation of the advowson; the clause is "in case of vacancy by death or otherwise, the next successor should officiate as parish minister, and so on from one to the other." The general word *his estate* will indeed carry the advowson; but testator only meant a voluntary officiating, till the living was filled. He is never named in the will incumbent of the living, but possessor of this estate. The trust is to take effect immediately on death of testator's wife, whether it was then vacant or not. If he proves dissolute, the college is to deprive him; but by augmenting a living a power of deprivation cannot be given to any [536] other than the bishop of the diocese. This will may be void for the uncertainty in the method of election. When a man will settle his estate in this odd, whimsical way, the court ought not to establish it; it is locking up property, which is against the policy of the law of *England*. The court has refused carrying into execution a particular turn of mind, though it was not a superstitious or illegal, but an indifferent use: as to feed sparrows, &c. especially as this is for ever. It would be a reproach to a court of justice and policy of the nation to suffer keeping up for ever a trust for such a purpose as that or as this, which is only a charity *ad bibendum et edendum*. In *Attorney-General v. Oakaver*, February 1736, the Master of the Rolls established a stipend given to keep up an organ and for the organist; but as to £40 *per ann.* to the choristers he refused it: on appeal your Lordship affirmed the decree; as the choristers never were allowed in parochial churches.

Lord Chancellor said, what he went on was, that it was contrary to the constitution of the church of *England* to have them in parochial churches; and that they would be under no rule of government as they are in other churches; and the law would not allow they should be under the government of the heir at law ———.

If this is no charitable or public, but a superstitious use, it results to the heir at law, Sir *James Markham*. The legal estate vests indeed in the college: but a corporate body may be a trustee. Superstitious uses go to the King by *st. H.* 8. not for benefit of the crown, but to dispose of them to other charitable uses of the like nature. Their vesting in the crown is, from their being all good uses as religion stood before the reformation; but that is the case only where it is really a superstitious use; for where it is an improper or illegal use, as this, it is void, and vests not in the crown (1): as in the case of *Oakaver*, who enjoys the land free from the £40 *per ann.* the court not directing it to be given to the crown.

LORD CHANCELLOR.

If this is no charity, there is no ground for the information in the name of the *Attorney-General* at the relation of the college on a devise to the

(1) See however to the contrary, Amb. 228. and 7 Ves. 76, 77. *Moggridge v. Thackwell*, 7 Ves. 36, &c.

college only; for such information can be supported on the foot of a charitable use. On a general devise to the college without more, the college being a body capable of taking must sue; the *Attorney-General* having nothing to do with it; and it is only before me on that information. [537]

As to the trust, created by these regulations on the devise to the college, I will give no opinion at present: it is a matter deserving consideration, and shall come before the court on all the circumstances of the case. The establishment of learning is a charity; and so considered on the statute of *Eliz.* A devise to a college generally for their benefit to increase the foundation and advance the end of the institution, to augment a Headship or Fellowship, or a new one, is a laudable charity, and deserves encouragement; and therefore they were excepted out of 9 G. 2. but this is not a devise of that kind for academical, collegiate purposes: but only to establish somebody to live at his house at *Denton* for ever, and to make his estate unalienable; answering no good to the college or the public, so far as it appears at present. It is necessary therefore for the court to consider materially, what may be the effect and operation thereof; how far good in itself; and if not, what may be the consequence of it, as to any power in the crown to give direction to the use of a charity improperly provided for in itself; as was done in *Attorney-General v. Baxter* (2), *Vern.* 248, where Lord *North* held, the trust did not result to the heir at law, the crown having power to direct in what manner it should go; and it was directed to *Chelsea College*. On a rehearing (before which the act of toleration passed) the court held, the charitable use was not contrary to law; and reversed the decree: but nothing was said against his opinion, that the power of directing came to the crown, if the trust was not supportable as a charitable use: But this I will not determine now, it fully deserving consideration; and it is necessary to know the effect of the devise itself; how far his direction for fixing a senior Fellow and providing for him in this manner is inconsistent with the constitution of the college as to residence, &c. for if so, it is contrary to the intent of this trust; which was, that he should be a continuing Fellow of this college, not barely when he is elected. Then a point will arise, if this is not a good charitable use within 43 *Eliz.* it will stand as a devise to the college generally; it will be to a body capable of taking; which will depend on the power they have, to take in *mortmain*, and it is necessary to be inquired into, how far they can do so, that the whole may be before the court when the trust comes to be determined. The Master therefore must inquire into that, and whether the regulations are inconsistent with the college-statutes; and reserve the consideration of the validity and operation of the trust till after the report.

The next consideration was, what related to Mrs. *Whorwood*, testator's

(2) It seems settled, that where the purpose of an intended charitable gift is either contrary to law, or too general and indefinite, the disposition is in the King, by sign manual. The contrary position therefore, contended in the argument, *supra*, is not correct. The *Attorney-General v. Baxter*, is thus mentioned in Lord *Hardwicke's* notes: "The decree was reversed, not upon any thing contradicting the general principle, reported to be stated; but because [it was] really a legacy to sixty particular ejected ministers, to be named by *Baxter*, and [the same] as a legacy to those sixty individuals." Vide per Lord *Eldon*, C. 7 Ves. 76.

widow: principally as what was to be laid out for her benefit under the marriage-articles, or under any agreement of the husband. She by her cross bill demanded, not only to have a settlement on her for life of the estate at *Denton*, which had not yet been settled according to the articles, but also to have the lands and tenements purchased with the share she was intitled to out of her father's estate (which was agreed by the articles to be settled) and also that share which came to her on death of her sister, so settled; insisting that by the note her husband gave to *Halsey*, there was a declaration of trust, or at least an engagement binding him and all claiming voluntarily under him, that the whole money should be laid out according to the trust in those articles; it extending to the whole, there was some consideration for it; it was a reasonable act: if he had come to have a sale of that trust-estate, and that the share arising from the sale belonging to his wife paid to himself, the court would not have let him had it, if the wife or her friends had insisted there was a narrow provision made on her on the marriage, and therefore a further settlement should be made.

This was not opposed as to her father's lands; but it was insisted, she was not intitled to have the benefit of the other part arising from her sister's death, by settling it in like manner; because not within the articles, not sufficient proof of any such agreement extending to that as would bind those in his place: nor sufficiently put in issue, if there was any new agreement for that; the bill putting in issue only the articles, and the rights arising under them, and nothing of this note. It is to be confined to trust in the articles: the wife levied a fine before the money came into the hands of the trustee: then the money coming in lieu of the estate is absolutely the husband's, and the court will not suffer the person into whose hands it comes to retain it, and say a settlement should be made on the wife.

LORD CHANCELLOR.

(q) It has unfortunately happened, that the affection, which at first subsisted between the husband and wife, did not continue; and she has been hardly used; which though it will not alter the justice of the case, is a reason that things should not be taken against her in a strict, harsh construction. The note is not strictly put in issue; but sufficiently for this purpose; and it would be to no purpose to put this off on any such defect so as to require a supplemental bill, if I should be clear in the point of right, as I am. Though there is no particular charge in the bill, yet in the interrogatory part there are questions relating to it: whether testator did not by some note acknowledge he received that money, and agreed to lay it out in this manner. The rule is, you are not only to question in the interrogatory part, but makes charges in the charging part; otherwise you cannot except (1); but the defendant, though not bound to answer to it, has done so; which being replied to, it is put in issue properly; consequently that informality in the manner of charging (for [539] it is no more) is supplied by the answering to it; for a matter

(q) 2 Vol. 17.

(1) See Mitf. 44. 6 Ves. 62. with Mitf. 45. and 11 Ves. 296, 301, 302, 376.

may be put in issue by the answer, as well as by the bill; and if replied to, either party may examine to it. Which brings it to the question of right; and I am of opinion, this note is sufficient to bind the testator, his representatives and claimants under his will, to a performance of what is there agreed to. A man may as between himself and his wife make an agreement or declaration of trust in his life: which though not for valuable consideration, shall take effect as against his executor or administrator, or those claiming voluntarily and in representation under him: of which there are several cases. In a case relating to *Lady Cowper's* estate, before *Sir Joseph Jekyl*, several things of that kind of gifts by *Lord Cowper* in his life, were established to belong to her, and to pass by her will: though they could not take effect against creditors, yet they should take effect, unless some imperfection in the instrument in point of law: which there is not in the present case. Then as to the construction and extent of the note. I think it was a reasonable act for him to do: and it is truly insisted (r), that on his application for the court would undoubtedly have ordered a further settlement. If then they did not come into court, but acted among themselves, and the husband has agreed to do that which the court would have directed, had the wife insisted on it in a proper suit, it should have its full effect. Though it does not appear in the cause, that the wife had levied a fine before this money came into the hands of the trustee, as it is said; yet that must be to satisfy the purchaser, as she was married: but I will not divide one act from the other, but take all as one transaction; and that this note though subsequent is an evidence of what was the agreement and intent, viz. that the money should be laid out in purchase of land to be settled to the same uses. The circumstances warrant that construction; the trustee in the marriage-articles being the proper person to intervene and receive the money arising by sale of that other share, and to see the articles performed for her benefit. He receives the whole; the husband coming to receive it out of his hands, it is on such a promise: which is an evidence of the terms on which the money was paid to him, and of the agreement and intent on which the wife joined in the fine for sale of this estate. It was reasonable; and what the court would have obliged him to, had he come before it; for that is the distinction: if the husband can lay hold of the wife's estate without aid of a court of equity, the court will not compel him to do so; as they will, where he cannot without such aid; which is the present case. The sum is particularly ascertained, and includes both shares, as well that which arises on her sister's share as her original share: and the promise is to lay out the whole of that sum; which therefore, I am of opinion, must be laid out pursuant to the trust.

Another question was made as to some lands purchased by testator after marriage, but never settled, whether they should not be considered as a performance of the covenant he was under to purchase land and settle on her for life; it being insisted on as a rule that where one is under covenant to settle lands, or to purchase and settle, if he leaves lands in their nature proper (for a reversion will not do) which were his former estate, and descend after his death, or if he purcha-

(r) 3 P. Wms. 205. Lord King decreed so, but did not seem to approve of the practice, and said, sometimes it proved inconvenient, but that it was too long established to be overruled. 1 P. Wms. 383. 2 P. Wms. 639. 3 P. Wms. 12. 1 Str. 239. 2 Atk. 417.

heir; but there are some copyhold purchased by him: which, not being, ~~set~~, and does not settle, it will be considered (unless evidence to the contrary) *pro tanto*, or in the whole, a performance of the covenant, and purchased with that view; not on the head of satisfaction but performance: otherwise it would cause great confusion in families. This has been before the court several times: first in *Wilcox v. Wilcox*, 2 Vern. 558. *Roundell v. Breary*, 2 Vern. 482. *Wilks v. Wilks*, by Lord Harcourt; and a case before your Lordship on Mr. Parson's will, [cited in *Lee v. D'Aranda*, ante, 1.]; and *Took v. Hastings*, 2 Vern. 97. for which your Lordship searched the register 515, where there was a bond to charge lands of £100 with £80 *per ann.* to his daughters, the obligor died, having two manors, without doing it: the court held, that one manor, (not appearing whether purchased before or not) should be liable; if that manor was purchased after, it is very strong. Lastly, *Smith v. Deacon* (1), March 26, 1746, where first there was a demurrer, and your Lordship had a doubt whether *Lechmere v. Lechmere* had not gone pretty far; but was afterwards satisfied on the bill of review. It was an agreement between the husband and trustees. *Smith* in consideration of £400 portion agreed to convey and settle houses, lands and tenements, or a rent charge issuing thereout, to himself for life, to wife for life in bar of dower, to the heirs of his body upon her, in default of such issue to the right heirs for ever, subject to a power to charge for younger children. After marriage he never made any settlement of the land or rent-charge; but purchased several little pieces of land, a piece of freehold of inheritance, another of reversion dependant on a life: the question was (s), whether these purchases at different times and small parcels, and some reversions (from whence it was argued, it could not intend them in performance of the covenant) were a performance, or whether the covenant should be made good out of his assets? Your Lordship mentioned all the authorities, particularly *Lechmere's*, and held, that they should be taken as an intended performance, and that those lands should be so settled. It was objected, that this would be affecting these estates as liens, which would follow them into the hands of purchasers or mortgagees; the answer of the court was, that this depended on the intent; and the presumption stood, that he intended a performance till the contrary was proved; but any act shewing he had not that in view, as a mortgage or sale afterward, would take off the presumption.

But this was given up on the other side; as *Lechmere's* and [541] the cases cited were too strong; that if a person, obliged under articles to purchase, does purchase, though not to the extent the articles require, that shall go to make it good, so far as it can be applied.

LORD CHANCELLOR.

It being admitted that the freehold estates purchased will be so applied, they must be settled on the widow for life; and afterward as to the purchases prior to the last will, they will pass thereby; as to those subsequent, after the widow's estate for life the reversion will descend to the

(s) 3 P. Wms. 228.

surrendered to the use of the will, in point of law descend. These cannot be applied to satisfy these articles. I do not know, that on a general covenant to purchase the court has taken copyhold lands (unless some agreement for that purpose) to go to make good articles in this manner: being liable to different tenures and to forfeiture. Unless therefore they pass by the will, they descend; which will depend on the penning of the will; and bring it to the question of the charitable use; for if it is such, it will be good by way of appointment. Yet I do not know any case where they have been made good as an appointment for benefit of a remainderman. It depends on this: whether there are sufficient words to take in copyhold lands? They are not mentioned; it is a general devise of real and personal estate; under which devise there is no instance, that copyhold shall pass if there is freehold to answer it; unless perhaps for creditors. But it must be inquired into to know, when these copyhold lands were purchased, before I can determine that.

Let the Master also inquire, what freehold were purchased after the marriage: and let what the testator paid for them be accepted and settled in lieu and satisfaction of so much of what the widow is intitled to. Let the residue be considered as a debt on testator's estate to be laid out in purchase of lands and settled for her jointure; the remainder in fee to the two senior Six Clerks, not toward the cause, (a method which has been sometimes taken,) for the benefit of the person, who shall appear intitled. Let the widow have interest at 4 per cent. for such money as ought to have been laid out, from her husband's death.

As to the costs at law, the devisee is not intitled to costs against the heir; for there are several cases where an heir at law disputes a will both in law and equity and yet shall have his costs; and this is a very proper case for it. As to the widow, I do not think it was improper for her to dispute the will; all parties therefore should have costs to this time out of the estate: but not to give her costs at law; yet I will not make her pay costs.

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PEAT v. CHAPMAN, August 3, 1750.

(Reg. Lib. 1749. B. fol. 552.)

At the Rolls.

Bequest of a moiety between two; one of them dying in testator's life-time, no survivorship, and his moiety is undisposed of (1).

TESTATOR desired all the rest and residue should be divided between two. That this was a tenancy in common was cited *Owen v. Owen*, 2 March, 1738, before Lord Hardwicke. 1 Atk. 494.

Master of the Rolls said, this must be understood to be equally divided: and by death of one in life of testator, his moiety should not survive to the other devisee of the residue: but be considered as undisposed of by the will, and divided among the next of kin, as if no devise had been thereof.

(1) See 2 Vol. 285, and 1 Ves. jun. 63. *Bennet v. Batchelor*.

OATS v. CHAPMAN, *August 6, 1750.*

S. C. 1 *Dick.* 148. *Et vide* 2 *Vol.* 100.—On reserving an order for allowing a demurrer, the costs are to be refunded.

Bill lies for specific performance, though a remedy at law.

AN order made by Baron *Clarke* for allowing a demurrer was now reversed: but defendant having immediately levied on plaintiff £5 the costs of allowing it, it was prayed, that in drawing up the order for disallowing it, it should be with costs to be returned to plaintiff.

Lord Chancellor had a doubt about it: for though a bill is dismissed, a decree made, and costs levied, and that decree is reversed on a bill of review or rehearing, though the principal is returned, he did not know that in those orders of reversal, the court ever mentioned any thing of costs. The plaintiff was now intitled to his costs in some way: the only doubt was as to the method. The demurrer seemed to be allowed on an apprehension there was a remedy at law by action upon a note in writing; but that certainly one might bring a bill for specific performance of any writing: for one may have several remedies for a deed; as *trover* or *detinue*; which is indeed partly a specific remedy by delivery up of the thing; but still he may make use of the greater remedy by specific performance, which is superior to that of damages.

A motion was afterward made, that the costs should be refunded.

Lord Chancellor thought it reasonable; for that on reversal of the former order, the parties were put into a situation, as if dis- [543] allowed originally; as on reversing a decree for dismissal of a bill on a rehearing.

But the Register, being consulted, saying he knew no precedent of refunding, *Lord Chancellor* desired him to see what the course of the court was on this occasion; but though no precedent could be found for it, he should not scruple making one; being agreeable to the practice of this and other courts, on reversal of a decree or judgment in law.

[The court afterwards ordered them to be refunded. *Post*, 2 *Vol.* 100.]

RYDER v. BENTHAM, *August 7, 1750.*

(Reg. Lib. 1749. B. fol. 532.)

Injunction against stopping lights until trial of the right; which was directed on the motion.

Court will never on motion make an adverse order to pull down what has been done.

MOTION for an order to pull down certain blinds so put up as to obstruct plaintiff's houses.

Lord Chancellor said, he never knew an order to pull down any thing on motion; it is sometimes, though rarely, done on a decree. The court will indeed sometimes on motion order the going on to be stopped: but the answer coming in last night, he desired it should be moved next day.

When it was argued, that the court might interpose instantly by inter-

locutory order to prevent that (u), for which damages will lie at law, but which are not an adequate remedy. The court will order a building which is erecting, not to be further proceeded in, though not directed to be pulled down (x); as that might do irreparable mischief to one party if on final hearing the right should be with him; and on that ground will not stay the working a mine; but that is not the present case; for by order to restrain from going on, it will be included that this shall not stand. On a right to a water-course or salt springs, if one working under ground diverts the stream, and on motion the court is of opinion the plaintiff has a right to prevent the injury during the hearing, it will be ordered to go in the mean time as before: as his lordship held in *Lawton v. Lawton*, which came out of *Cheshire*. It is only to keep things as they are, till a final determination.

Against the motion. The houses lie in *Leadenhall Street*; and the custom of *London* allows the building higher, and raising new houses on ancient foundations higher, though it does obstruct another light (1). *Yelv.* 115. 1 *Bul.* 115. *Godb.* 183. and *Calthorp*, 41. in which last case the custom was held good, as it might arise on a lawful commencement in cities. There is some contrariety between the maxims *cujus est solum ejus &c.* and *sic utere tuo ut ne alienum lœdas*; so that at least it is a doubtful right: then the court will never interpose by injunction. But [544] it is not doubtful according to this law, that the defendant has a right to build on this ancient foundation.

It being agreed, that this must be tried, *Lord Chancellor* said, the sooner the better, and to grant an injunction in mean time: and then this scaffold should be removed. Let the parties therefore by consent proceed to a trial at law in case by the plaintiff, for stopping up his lights: and the defendant to pull down the scaffold, or poles and boards already raised, and be enjoined from building or erecting, whereby any of plaintiff's lights may be obstructed, till after trial had.

(u) 2 *Brown*, 65.

(x) Such motion must be founded on prescription or agreement. 2 *Vol.* 452.

(1) See *Fishmonger's Company v. East India Company*, 1 *Dick.* 163. and *Morris v. Lord Berkeley*, post, 2 *Vol.* 453. and *Attorney-General v. Doughty*, *ibid.* 454. See also *Attorney-General v. Nichol*, 16 *Ves.* 338.

"GAGE v. LORD STAFFORD and FURNESS, August 7, 1750.

(Reg. Lib. 1749. A. fol. 516.)

Where referred to a master, whether two bills are for same matters: where not.

GAGE brought a bill against the representatives of *Mr. Cantillon*; insisting that he was a creditor for a sum of money arising from the sale of his actions, deposited in the shop of *Cantillon* and *Hughes*, bankers at *Paris*, in 1720; to have an account of that transaction; and that what was raised out of his actions, should be applied first to satisfy the demands of *Cantillon* against him; the surplus to himself.

Another bill was brought against him by the executors of the late Lord *Powis*, insisting, that this sum was due to *Gage*, and claiming by an assignment with a defeasance.

For defendant it was moved to refer to the Master to see whether both bills were not for the same matter, and that one should be stopped; which is of course where under the same name; and the rule holds in this indirect manner of doing it, which is the same in effect, though by different persons, and tends to more vexation than where both in the same name, as there must be different answers, and the examination in one cause cannot be made use of in another. The assignment was only fictitious; granted for a particular purpose: but if real, *Gage* has parted with his right, and they cannot at the same time carry on a suit as his assignees and a suit in his name. *Cestuy que trust* cannot sue in his own name and his trustee's. The rule of the court is, that the same person shall not doubly vex the party; and the foundation of both bills is, that the estate of *Cantillon* is debtor to *Gage*; and it is sworn, that both are carried on by the same hand, and same expence, and the same solicitor employed in both.

LORD CHANCELLOR.

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Consider the course of the court. If two actions at law are brought in the same name and for the same matter, the pendency of one may be pleaded in abatement of the other: but if two such bills are brought, this court takes a more particular method: referring it to a Master to inquire whether both are for the same matter, and if so, may stop the proceedings in the last. Another case, in which the court is warranted to stop proceedings short, is that of an infant; as where two bills by different *prochein amies*, the court will refer it to see, if for the same matter, and which is most for the infant's benefit, and will stop the other (1). But there is no other case, where the court is warranted to do so, where the bills are in different persons names. I have indeed a suspicion, that both these bills were set on foot by the same persons for their benefit, and at the same expence; but it is not every ground of suspicion that will warrant the taking extraordinary steps out of the course of the court, or the restraining a man in a country of liberty from suing as he pleases, unless it be within the course of the court to do so; which would be assuming an arbitrary power, and introducing a way of judging summarily, of the merits of the case, by referring it to a Master to inquire into the very merits touching the assignment; which is a precedent I shall never make. Where a defendant would not appear, and a sequestration is proceeded to, it was very reasonable that the cause should be set down, and the bill taken *pro confesso*; yet the course of the court did not warrant the doing it, till an act of parliament was made. But it appears plainly to me, that these two bills were not for the same matter; they are so indeed as to the foundation of the demand: but for a different equity; the equity of the

(1) Such a reference is, of course on the mere allegation of council; and the master is always at liberty to suggest any improvements in the suit, and to report any special circumstances that may be for the infant's advantage. *Sullivan v. Sullivan*, 2 Meriv. 40. It seems, however, a motion for such a purpose should be on notice. Editor. After the master's report in favour of one suit, without an impeachment of the other, the costs of the latter will generally be directed to be paid. *Ford v. West and Others*, last day of Hill Term, 1818. 1 Wilson's Chan. Cases.

executors being founded on the assignment, which being with a defeasance is an assignment by way of security, and is not taken notice of in *Gage's* bill. Compare it to other cases; suppose a mortgage on a real estate, and a derivative mortgage or assignment thereof is made by the mortgagee: the assignee or derivative mortgagee may bring two bills to have a redemption or foreclosure. I could not stop either of those suits, though carried on by the same person, nay though the same solicitor employed (which is often done, and properly) I should not refer it to a Master: yet when the causes came to be heard, that would be an ingredient in the consideration of costs; which the court would order to be paid for the vexation. Suppose it was at law; (and it often happens) a man may suppose a title in himself, to what is recoverable at law? but may be doubtful of that, and think, that if he should fail in that action in his own name, he may prevail by bringing an action in name of his trustee [546] tee: and there is no instance of the court's stopping either of those actions; for one may bring two different actions in two different names to try his chance on which he can recover. So it may be in this court; one may bring two bills at his own expence, making use of the name of his assignor in one; nor can the court say, he shall be stopp'd in one. In that in which he does not prevail, his bill must be dismissed with costs; and that is the remedy: but otherwise the court would take on themselves beforehand the judgment of the merits, and the title on which it is best to recover. There being no precedent of that kind, the very foundation of the motion fails; for supposing both brought by executors of Lord *Powis*, and carried on at their own expence, I am not warranted therein, unless enabled by another authority: and when you can shew me an act of parliament for that purpose, I will do it.

GARTH v. SIR JOHN HIND COTTON, *August* 10, 1750.

Vide S. C. ante, 524 to 530. and 3 *Atk.* 751.—Waste. Tenant for life. Tenant for years. Tenant in tail. Reversioner. Rights, powers, and duties of trustees to preserve contingent remainders.

Rise and intent of trustees to preserve contingent remainders.

Construed liberally. May bring bill to stay waste before contingent uses in *esse*. So for infant *in ventre*.

Such trustees joining to destroy the remainders a breach of trust, and an alliance with notice affected.

LORD CHANCELLOR.

ALTHOUGH I have taken a great deal of pains, I cannot yet form an opinion from an apprehension of breaking in upon the rules of law, or establishing a dangerous precedent in a court of equity. The case is admitted to be entirely new (1). The strength of the arguments for the plaintiff is

on the authority of *Pye v. George*, and *Mansel v. Mansel*, (3), where the court has considered trustees to preserve contingent remainders as trustees to all other purposes so as to be affected by breach of trust and all the consequences: and therefore if they have been negligent in not bringing a bill to restrain the waste, it should not turn to the prejudice of the remainders, when *in esse*. But it deserves to be considered, whether they have any trust to preserve the timber; because their legal estate is not at all for that purpose; being only an estate *pour autre vie*; by which there is no interest in, or power over the timber: and which is at an end as soon as the first tenant for life dies. It is said, they might bring a bill for injunction to stay waste, before the contingent remainders vested; and I am of that opinion: but I do not know that arises out of their trust for the timber. It is a bill by *amicus curiæ*; as in a bill on behalf of an infant in *ventre sa mere* to stay waste. Till the estate attaches in possession, they have nothing to do with the timber. If indeed there is a forfeiture by the first tenant for life, they would have a right to the shade, &c. but nothing to do with it during the life of tenant for life. This is no opinion; but only my doubts from the breaking in on the rules of law on one hand, and on the other the laying down a precedent in equity which might be dangerous. Let it therefore be spoke to again next term. I can find no case where the court has preserved the timber, though cut down by wrong for benefit of the contingent remainders. In *Whitfield v. [547] Bemick* it was not by accident, but by wrong; and though *Peere Williams* has not mentioned, whether they were trustees to preserve, &c. I have looked into it, and find there were.

Michaelmas Term 1750, it was argued again.

For plaintiff. The bill is against the defendant only so far as he has benefited himself by agreeing to this act, which is a detriment to the plaintiff's inheritance. The case is new in *specie*, but the court will go on the general principles of law and equity. The whole merits depend on two points, first, whether on application by the trustees at the time of agreement the court would have restrained them both, the tenant for 99 years from cutting by licence of the remainder-man, and the remainder-man from coming upon the estate by licence of the tenant? Next, if so, whether satisfaction ought not to be decreed for that act, when done; which the court would have prevented as against conscience?

As to the first: To shew that the court would have done so, it is necessary to state the notion of justice established as to preserving timber, houses, mines and other things capable of being in fact severed from the inheritance, and which yet are part of it in motion of law, and considered as annexed. There are but four cases, in which a court of equity interposes to preserve an inheritance entire. First, where there is no legal remedy whatever that extends so far as to answer the intent of the settlement, under which all claim, and from which intent it is clear, that what is doing is wrong. This holds, where tenant in tail *apres possibility*, &c. or wife tenant in tail *ex provisione viri*, goes to pull down houses or commit destruction. No action of waste or of property can be brought, yet this

court will enjoin; *Abraham v. Bubb*, 2 Sho. 96. and *Cooke v. Whalley*, Eq. Ab. 400: because the mansion-house is settled as well as the rest; and this tenant in tail *apres* &c. is but tenant for life, who could not do it, though he was so without impeachment of waste. This is the most ancient jurisdiction of equity; in the time of R. 2. Moor 554, and several precedents in H. 8. and E. 6. but since the case of *Raby Castle* (1) it is established. There was tenant without impeachment of waste, (which since *Lewis Bowle's* case gives leave to commit waste) yet would not this court suffer it, because contrary to the form of the settlement, though there was no legal remedy. On the same principle have been cases as to an avenue in a park for ornament or shelter. [See 1 Bro. 166, and 3 Bro. 549. 6 Ves. 107. 8 Ves. 70, 71.] Secondly, where there is a temporary impediment to the remedy at law, so that the act is at the time punishable, equity interposes; as where there is an intermediate

[548] tenant for life, the remainder-man of inheritance cannot bring an action for waste by the first tenant for life, for the sake of the preservation of the innocent remainder for life. 2 Inst. 301. It is not so if it was a remainder for years, and it would not be destroyed by the action. But a stronger case is of an estate for life, remainder for life without impeachment of waste, and with power to commit waste; both agree to commit waste: and though punishable at law, yet this court would enjoin, on the principle that it was an injury to the inheritance, although it was a bare contingency whether it would be a prejudice to the owner of the inheritance or not; which was *Lady Evelyn's* case. So in *Fleming v. Fleming*, though no remedy at law. The third case where there is a remedy in equity only, is, where a person, who may be consequentially injured by the waste, from the weakness of his estate has no remedy at law: as where tenant for life, remainder for life with or without impeachment of waste, remainders over; on the bill of remainder for life, the court would restrain the first tenant for life from committing waste, *Darrel v. Champness* (2). If guardian of infant tenant in tail cuts down the whole timber, the court will not on application of the remainder-man enjoin; which was *Savil v. Savil* (3); although the infant there was very ill, and did die before he came of age; but if done in such a way as to be the prejudice of the infant himself, on application of the infant the court will judge, what is for his benefit. The fourth, and most material to the present case, is where new limitations are introduced and allowed by law and courts of justice, since the time that all the doctrine about waste was settled. Since the statute of *Glocester* courts of law cannot adapt their remedy to a new purpose: then the court interposes on the foundation of justice, and on the principle that, this new sort of limitation being introduced, it must be protected in all its consequences, because the limitation itself the law allows. Executory devises and springing uses existed not before the time of King Hen. 8.: then none of the rules at law concerning waste can be applied to them; and any man, having a fee subject to be defeated on contingency, may in point of

(1) 1 Salk. 161. 2 Vern. 738. Prec. Ch. 454.

(2) Eq. Ca. Ab. 400.

(3) 2 Atk. 458, 464.

law, pull down houses, and cut down all the timber: no legal remedy, as action of waste or *trover* for the timber, lies; nor a prohibition: but in equity there is a remedy. In *Litton v. Robinson* (1), the inheritance being over to the daughters or contingency, your Lordship thought the intent was, that the whole and every part of the inheritance should be preserved to wait that contingency: and that a bill may be brought for infant *in ventre* to stay waste; the statute of King *William* having declared him capable of taking, that is, preserved a contingent remainder to him; yet that infant has no legal remedy; nor after his birth can he bring *trover*. This court then interposes, because the law does not. When the legal remedy about waste was established, no such thing was known in the law as a contingent remainder, which might not be destroyed by the tenant for life and first owner of the inheritance. It was of no value at all, and then why should part be preserved? Which was the ground of the determination in *Udall v. Udall*, and 1 *Rol. Ab.* 119. This limitation being for years could not then exist at all, as there must [553] be a freehold to support the contingent remainders: but it is now allowed; being introduced at the time of the troubles about 1640, by Sir *Geoffery Palmer*, who invented it for preservation of contingent remainders: but no legal remedy is adapted to it. The court then will act on the same principles as in executory devises, which are very like this, being a limitation to arise on contingency. Where indeed there are no trustees to preserve, &c. this court would not grant an injunction to stay waste against tenant for life, and first owner of the inheritance, who by the rule of law may, notwithstanding the contingent remainders, do what they will with the whole estate, and then may with part of it; this court not relieving against a general rule of law. But now such trustees are allowed and approved of, they must execute this trust according to the different remedy the constitution allows, to preserve every part of it: so that if tenant for life levies a fine, his particular estate is forfeited: they shall enter; but though they do not, their right of entry shall preserve all the contingent remainders. If he sells timber, there is no remedy at law; they must apply to this court; and it is established, that on an executory devise, this court will interpose (2). But they are more emphatically entitled to this here; for the very purpose, for which they have an estate for life, is to preserve the contingent estate afterward to arise; this court considering it as an executory trust; so that if they had brought a bill, both would have been prevented: because both were doing an injury; the owner of the inheritance in cutting down before it was his day: as in *Evelin's* case; and it would be of very extensive consequence, if a court of equity should not interpose, when there is no legal remedy adequate. A right without a remedy is a solecism; this court finds one, as in case of infant *in ventre*, of executory devises, and where there are temporary impediments. If on such bill by the trustees, the court would not restrain, the argument must be given up. None but the trustees could apply: for though any one may file a bill in name of an infant *in ventre*, considered as having existence in many cases, it is not so here: but the trustees, who have a foundation to go upon, as having a remainder themselves prejudiced by this act can alone apply.

(1) 3 Atk. 209. See *Mr. Sanders' edit.*

(2) Vide 10 Ves. 273, &c. 278, 279. &c.

If then the trustees, through ignorance or neglect did not bring such bill, the second consideration arises, whether satisfaction ought not to be made now? Should this court say, they only enjoin, there is no adequate remedy for it might be then done by surprise. Lord *Barnard* was not only restrained, but obliged to make satisfaction and restore, on the principle that the court would have prohibited him, and that complete justice could not otherwise be made. Where trees are cut down, specific satis-

[554] faction cannot be decreed: it then is only by way of compensation, by damages. A bill to stay waste draws after it an account of the waste committed; if the injunction is disobeyed, an attachment would issue: the terms on which the court would suffer the contempt to be cleared, would be on paying costs of the contempt, and making satisfaction as far as could be: for the commitment is only a mean, and otherwise no one would value risking the contempt. It is a maxim, that neither infant or person unborn can suffer by laches of trustee, or of the person who ought to act; but the doctrine contended for would put their fate in the power of these trustees. If trustees join in destroying contingent remainder, it would take effect at law; but this court would set it up again; and if it got into the hands of purchaser without notice, would make tenant for life, and every one who joined make satisfaction. If indeed the trees were blown down, or cut by wrong or trespass, without permission of the owner of the inheritance, the property would *ex necessitate* be the defendant's: as it cannot be in abeyance, and the severance was without default: there would be nothing, of which this court can lay hold against his conscience. *Whitfield v. Bewick*, as in 3 *P. Will.* is no authority in the present case. On searching the register it appears indeed, that there were trustees: but the court did not go on to that; the objection was not taken, nor did the argument proceed on it (1). If no satisfaction can be obtained for this, timber may be destroyed and mines opened on every estate contrary to intent of the makers of the settlement, and of every one intitled under it, except first owner of the inheritance, who may destroy the whole, or work the mines barely on consent of a common farmer for life by collusion with him, or *ex vi* if he does not agree; an action for the loppings and shade alone could be brought by the tenant; which it would be worth while to pay on a wooded estate. There are few estates in *England* which are not let for years; and the first owner of the inheritance (although his remainder is very remote) may, by joining with such tenant, strip the estate; for trespass or waste cannot be brought against him: this argument, *ab inconvenienti* is the strongest at law as well as equity. As therefore the law allows these contingent limitations to be made and preserved, and most lands in the kingdom are so settled, and the intent of the parties is to preserve the timber as well as the rest, and as there is no legal remedy, this court will find one which will not be adequate, if satisfaction is not made, after the act is done. This therefore is not a particular case, but a very general and universal one.

For defendant was cited *Claxton v. Claxton*, 2 *Vern.* 153, and *Aspinwal v. Lee*, 2 *Vern.* 218, and that if the parties were disabled from severing the timber, it might be kept too long on the estate, and rest in suspense for several years to the detriment of the public.

(1) See the 5th edition, 3 Vol. 268, note. Et ante, 529.

Lord Chancellor took further time to consider of it; and Sir John Hind Cotton having died pending the suit, and the cause revived against his representatives, his Lordship gave judgment, 5 Feb. 1753.

The foundation of the plaintiff's equity depends on the trust to preserve the contingent uses. There was a plain fraud in the agreement to injure the contingent remainders; there is a privity between the tenant for years and remainder-man, the tenant for years being a *Fiduciary*.

Four questions are to be considered. First the intent of limitations to trustees support contingent remainders? Second, what estate they take at law, and what actions they may bring? Third, the nature and extent of the trust in equity? Fourth, how charged in equity, for breach of trust? As to the first question, they took rise from *Chudleigh's* case, 1 Co. 120, and *Archer's* case, 1 Co. 66: but not in practice till the usurpation. The dispute in *Chudleigh's* case was the power to destroy contingent uses, before *cestuy que use* was in being; it was not determined, that the conveyance by *cestuy que use* for life would bar the contingent remainders, but it was afterward determined in *Archer's* case, very properly set forth by *Pollexfen* in *Hales v. Risley*. As to the second, it was a question, whether they took any estate or had only right of entry; but it was settled in *Cholmley's* case, 2 Co. 51 a. so is 41 E. 3. and *Fitzherbert*; and *Duncomb v. Duncomb*, 3 Lev. 437, which last was the first case, where a limitation to trustees came in question. If then it was so settled upon a limitation for life, it is stronger after a limitation for years: as was well urged by *Lee*, Chief Justice, in *Smith v. Parkhurst, Michaelmas*. 14 G. 2. They have therefore in law an interest in the timber by the enjoyment of it in the tenant for years: but they could not bring *waste* at common law, and the statute of *Gloucester* gives it only to those who have interest in the inheritance. Thirdly, these trusts are to be construed in the most liberal manner agreeable to natural justice: as in *Mansel v. Mansel*, [2 Wil. 678.] The destruction of timber or mines may more affect the inheritance than any other. It is said, they cannot bring a bill to stay *waste*, they only can enter; but that is preserving the shell, and not the kernel. The words comprehend all remedies in law and equity; for equity being now part of the law of the kingdom, is comprehended. They may bring a bill to stay *waste* before the contingent uses come in *esse*. *Dayrell v. Champness*, Eq. Ab. 400, their trust affects their conscience. The same bill may be for an infant *in ventre*, which is stronger, *Musgrave v. Parry*, 2 Vern. 711. Therefore the trustees might have brought this bill in this case; if so, the parties would be discharged only upon the [556] terms of making satisfaction in damages, to be laid up till the contingent uses should come in *esse*. As to the fourth, in *Pye v. George* [1 Wil. 128.] Mich. 1710, trustees joining in destroying contingent remainders is a breach of trust, and the estates created are void. *Tippen v. Pigot*, Mich. 1713; and *Mansel v. Mansel*, [1 Wil. 359. cited Eq. Ab. 385.] the trustees shall be obliged to make a recompence, and the alienee restore the estate. The difference here is, there is no positive act, but only a laches in not bringing a bill for injunction; but they, who have profited by the destruction, are not excuseable. Notice of the trust makes the laches of the trustees to affect them; and notice of the trust

affects the alienees: therefore as in alienation with notice a reconveyance is just, so here though before the contingent remainder-man be in *rerum natura*, and had no *jus in re* nor *ad rem*. The objection for the defendant, that the limitation to the trustees does not alter the power of tenant for life, assumes too much. The invention was to abridge the legal rights of tenant for life, and of the remainder-man to take a surrender. According to 2 *Wil.* 240, and *Aleyn*, 82, the right in law is, that as soon as they are severed, they vest in the remainder-man, and *trover* lies: but this was a collusion with the remainder-man. Where a legal right is acquired by collusion, this court shall enjoin or give a recompence. I will adhere, as far as I can, to the rule *aquilas sequitur legem*; though till the remainder is vested, no action of waste lay, yet a remedy is given. *Page's case*, 5 *Co.* 76 b. and if the estate be divested, and afterward revested, he may bring *waste*, 1 *Inst.* 358 a. The successor of a bishop may maintain *waste* for waste after death of his predecessor, when the freehold is in the King. *Fitz. N. B.* 1 *Inst.* 356. a. it may be said, this is by the statute of *Marlbridge*; but I hold it not: and so says 2 *Inst.* 151, 152, and 29 *E.* 3. 15 b. 2 *H.* 4. 2 *Rol. Ab.* 824. A court of equity has gone further in restraining waste than the law *Moor.* 554. 1 *Rol. Ab.* 377. 1 *Vern.* 23. 2 *Sho.* 69. 2 *Freem.* 54, 55, 278. *Abraham v. Bubb*, and a stronger case of *Lady Evelyn* there cited. On the same foundation I determined *Fleming v. Fleming*, 19 July, 1744, and *Robinson v. Litton* (1), 12 December, 1744, went further. It is objected, that no recompence will be decreed upon a bill now brought for an account, and the case of *Jesus College v. Bloom*, 19 November, 1745, was cited; but that is widely different from the present; and 2 *Wil.* 240, is cited; the distinction arises from the collusion between the remainder-man, and tenant for years. As to the length of time, no laches in the plaintiff, and the law gives *waste* after a mesne remainder-man is dead: beside the plaintiff submits to what is in the answer. An objection occurs to me, that there is a recovery, which has altered the remainder. I admit 1 *Inst.* says, regard is to be had to the continuance of the reversion in the same state; but there is no new use created: and it was determined to be the same estate in *Lord Derwentwater's case*, and *Abbot v. Burton*, 2 *Salk.* 590, and in another case, *Hil.* 16 G. 2 affirmed by the Lords. In this case the plaintiff is intitled to the same relief: although [557] the remedy at law should be extinguished. There are many instances, where a court of equity has relieved in cases, where the action dies with the person. Before the statute of *William and Mary* there was no remedy at law against executor of an executor for a *devastavit*, yet a court of equity did this before. *Price v. Morgan*, 2 *C. C.* 217. and the case of *Eton College*, 1 *C. C.* 121. and 2 *Mod.* 293, 294. In all cases of fraud the remedy never dies with the person, but will follow the estate of the party liable to the demand. Here the will appearing on the face of the articles proves they had notice; and therefore it was a fraud with the remainder-man. Arguments *ab inconvenienti* have been urged: but those on the part of the defendant are not so great as those on the

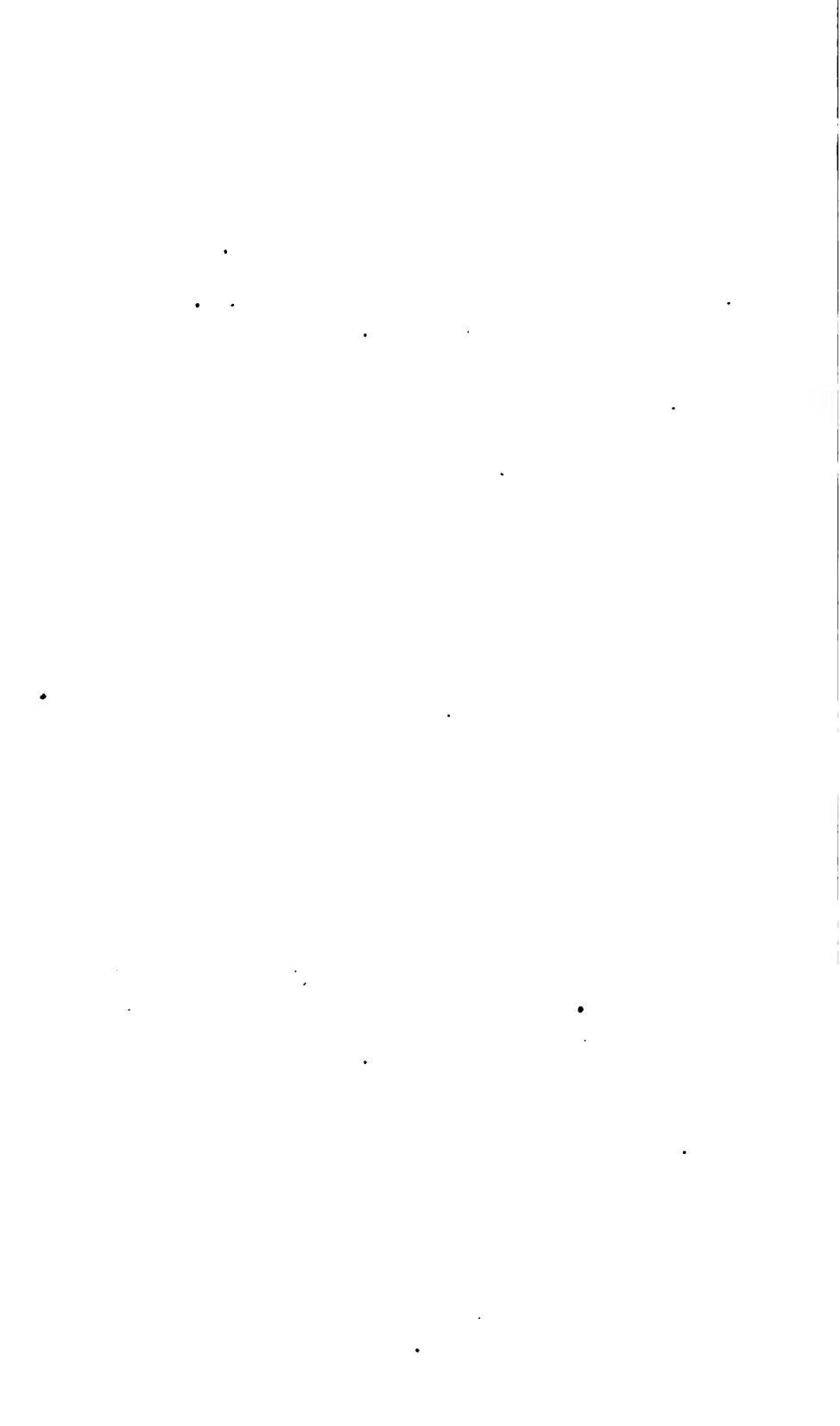
(1) 3 *Atk.* 209. and 8 *Vin. Ab.* 475. See the difference between the two reports noticed in *Mr. Sanders' edit. of Atkyns*, *ubi supra*.

other side. *Fermor's* case, 3 Co. 79. trustees to preserve contingent remainders, are a proper *medium* between perpetuities, and too great licence of power over estates.

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(1) See 3 Atk. 758.



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Ibid.

See LAPSE. SALE.

CONDITIONAL LIMITATION—420.

Devisee on condition that the land should go over to another, if he did not give a release in three months after testator's death, dying in the testator's lifetime, the devisee over shall take instead of the heir at law. This being a conditional limitation, and not a strict condition. *Avelyn v. Ward*, 420

CONFESSO.

Bill pro confesso.

Wharam v. Broughton, 180. 185

CONFIRMATION—31. 189. 400.

See JOINTURE. MISTAKE. PRACTICE.

CONSENT—133. 163. 413.

Judgment in a cause heard by consent, reversed on appeal.

Butterfield v. Butterfield, 139

See APPOINTMENT. PRESENTATION.

CONSIDERATION—73. 128. 215. 216. 279. 280. 379.

1. Where any consideration is mentioned in a deed, and not said for other considerations, you cannot enter into proof of any other; otherwise where no consideration at all in the deed.

Peacock v. Monk, 128

2. In marriage settlements, &c. on good or valuable consideration as between the immediate parties, such consideration will run through all the limitations for the benefit of the remotest persons; even in those in respect of whom the deeds would otherwise have been voluntary.

Itell v. Beane, 215

3. Husband on second marriage, contracts to pay money in trust for the wife for life, and afterward for the issue of that and a son by a former wife: his creditors cannot come upon this against the son as being a voluntary disposition as to him.

Ibid. 216

See AGREEMENT. IMPOSITION. PURCHASE.

CONSTRUCTION—15. 21. 41. 57. 58. 85. 91. 97. 106. 148. 150. 168. 169. 170. 217. 226. 227. 271. 273. 281. 290. 294. 308. 335. 409. 427. 507.

1. "And" construed "or."

Hawes v. Hawes, 15

2. Transposition of words in a will.

Ibid.

3. Construction of a trust. Surplus rents, &c. not included in the term "portion."

Vane v. Vane, 57

4. Legacy given to the children of *S.* she then having but one, held for the bene-

CONSTRUCTION—Continued.
fit of all born, or to be born.

Maddison v. Andrew, 58

5. Bequest by an *East India* captain of all household furniture, linen, plate, and apparel whatsoever, includes only what is for domestic use, not what for trade or merchandise. Construction of the words "or" and "and." Medals when to pass by a bequest of money.

Lee Farrant v. Spencer, 97

6. Construction to be made on the whole will. Not material in what order the clause is. *Carter v. Carter*, 169

7. "And" construed "or."

Jackson v. Jackson, 217

8. After-born children included in a devise to "A's children." Satisfaction. What passes by the word "estate, &c." either alone, or with the addition of other words.

Goodwyn v. Goodwyn, 226

9. Weight to be laid on introductory words of a will shewing intent to dispose of all.

Goodwyn v. Goodwyn, 227

10. Neither *choses in action*, or securities for money pass under a bequest of "goods and chattels."

Chapman v. Hart, 271

11. What passes by a bequest of all goods and chattels in a house. Not a bond or *chose in action*. *Ibid.* 273

12. Power of appointment by a father not well executed: being contrary to the intention, as collected from a reasonable construction of the recital of the deed, which created the power. "And" construed "or."

Burleigh v. Pearson, 281

13. *Second born son* may take under a limitation "to the first born son, he being so at the time.

Lomas v. Holmden, 290

14. Wills in general construed from the making; unless circumstances, or, the tenor of it shows it should be from death of testator; but the intermediate time not regarded. *Ibid.* 295

15. Plate passes under a bequest of "household goods."

Stapleton v. Conway, 427

See AUGMENTATION. CHARGE. CONTINGENT INTEREST. EQUITY. INHERITANCE. ISSUE. MAINTENANCE. MARRIAGE ARTICLES. MISTAKE. PORTION. POSTHUMOUS CHILD. RELATIONS. RELEASE. RENTS AND PROFITS. SURVIVORSHIP. WARRANTY.

CONTINGENCY AND CONTINGENT INTEREST—47. 189. 190. 237. 256. 409.

1. Contingent interest transmissible.

Hodgson v. Rawson, 47

2. Will on a contingency. Devise in case of testator dying before his return from

Ireland. Having returned, &c. the whole disposition ineffectual.

Parsons v. Lane, 189

3. The instrument of a will or codicil may be eventual as well as the disposition, and should not then be proved in court ecclesiastical. *Ibid.* 190

4. Contingent interest will go to the representative. *Peck v. Parrot*, 237

5. Devise of land on contingency to Robert "or his heirs." Robert, before the contingency happens, conveys "all his right, title, claim, and demand" therein, by deed, to his younger son and his heirs, as a provision, and dies. The contingency happening, Robert's heir cannot claim this against his father's act; "or" construed "and."

Wright v. Wright, 409

See AGREEMENT.

CONTINGENT REMAINDERS—268. 9.

434. 524. 555. 556.

1. Contingent remainders supported, though no trustees to support inserted.

Hopkins v. Hopkins, 268. 9

2. Duty of trustees to preserve, &c.

E. Portsmouth v. Ld. Effingham, 434

3. Rise and intent of trustees to preserve contingent remainders.

Garth v. Cotton, 555

4. They have more than a right of entry. *Ibid.*

5. Such trusts are construed liberally, the trustees may bring bill to stay waste before contingent uses *in esse*. *Ibid.*

6. Joining to destroy the remainders a breach of trust and a license with notice affected. *Ibid.* 556

See WASTE.

CONTRACT—217. 459.

1. In contracts, if a tenant in tail persists in refusing to execute, and dies, the court will not decree the succeeding tenant in tail to perform it; for such a one takes *paramount per formam doni*.

Attorney-General v. Day, 217

2. Though specific performances might have been decreed against original parties holding as tenants in common, yet, where an alteration prevented a decree as to one moiety, the court would not direct a performance as to the other; the contract being entire, and an execution of half of it inadequate to the prime object. *Ibid.*

3. Contracts on risk, taken as at time of agreement. *Baker v. Paine*, 459

See AGREEMENT. USAGE.

CONTRIBUTION—258. 428.

1. Leasehold interest.—Contribution and apportionment for renewal. The rule laid down by Lord H. in this case, as to a tenant for life contributing one-third, does not now prevail. No contribution from an annuitant for life out

CONTRIBUTION—(Continued.)

of leasehold renewable interests.

Vernay v. Vernay, 428

2. See *Kirkham v. Smith*, 258, and **TENANT IN TAIL**.

CONVERSION—220. 320.

As to conversion of real into personal estate. *Attorney-General v. Day*, 220

See also **MORTMAIN**.

CONVEYANCE (FRAUDULENT)—220. 359.

Fraudulent conveyances.

Ryall v. Rowles, 359

See also **PURCHASER**.

COPYHOLDS—54. 63. 121. 215. 225. 6. 229. 234. 271. 462. 485. 489. 541.

1. Covenant by deed before marriage to settle on wife, if she survive, part of the real estate for her jointure, and in full recompense of all dower or third which she can any way claim, &c. out of any lands, &c. of which he is or shall be seized of freehold or inheritance; she is hereby barred from claiming her free bench out of copyhold purchased afterwards. *Walker v. Walker*, 54

2. Copyholds unsurrendered by mistake, want of surrender supplied in favour of a younger child.

Banks v. Deneshire, 63

3. Trust of a copyhold may be devised without a surrender to the use of the will. As to another copyhold of which the testator had the legal estate, the heir was put to his election.

Allen v. Poulton, 121

4. Devise of all testator's "real" and personal estate, "subject to debts," affects copyhold lands unsurrendered, for the benefit of the creditors, there being no freehold lands. If there had been, it would have been otherwise. No preference allowed to a creditor who became a mortgagee under the devisee in trust. *Ithell v. Beane*, 215

5. Copyholds, where surrendered, pass by will without any witness.

Attorney-General v. Andrews, 225

6. Trust of a copyhold not surrendered to use of a will, devised by a will without any witness held good. Copyhold not surrendered to use of the will devised to a charity held good, notwithstanding the statute of frauds, amounting to a direction to the heir to make a surrender; but it is also good by way of appointment by 43 *Elis.* under which a devise of lands in tail, though no recovery, is good. *Ibid.*

7. Devise of "all messuages, lands, &c." will pass copyholds, where the introductory words shew testator's intent to dispose of all his estate.

Goodwyn v. Goodwyn, 226

8. The court will not supply the surrender of a copyhold in favour of a wife

or child, under a merely presumed intention to devise it.

Chapman v. Hart, 271

9. Trust of copyhold deviseable without surrender. But otherwise, as to copyholds of which the testator had the legal estate.

Gibson v. Lord Montfort, 485

10. Trust of copyhold may be devised without surrender to use of the will. Not where testator had the legal estate. *Ibid.* 489

See **BARON AND FEME. ELECTION. PERFORMANCE. WASTE.**

COSTS—43. 74. 77. 126. 160. 250. 339. 542.

1. See *Hill v. Ballard*, 77, and note.

2. Costs against executor, his answer being evasive and contradictory.

Reech v. Kennegal, 126

3. Right to principal and interest generally carries costs, and a tender must be very express and formal to excuse them. *Gannon v. Stone*, 33

4. On reversing an order for allowing a demurrer, the costs are to be refunded.

Oats v. Chapman, 542

See **APPEAL. CHARITIES. HEIR. MORTGAGE.**

COVENANT—1. 6. 12. 19. 51. 56. 100. 258. 275. 376. 515. 16. 17. 541.

1. *Vide SATISFACTION* 1.

2. Collateral covenant in a lease not running with the land binds not assigns.

Lord Usbridge v. Staveland, 56

3. Words amounting to covenant in a deed.

Williamson v. Codrington, 516

See **AGREEMENT. BARON AND FEME. EXONERATION. INHERITANCE. PERFORMANCE. SATISFACTION. VOLUNTARY DEED. WARRANTY.**

COVERTURE—298. 305.

See **BARON AND FEME. INFANT.**

COURT (FOREIGN)—298.

See **LUNATIC.**

CREDITORS—27. 46. 106. 127. 173. 211. 215. 216. 232. 239. 242. 250. 280. 347. 456. 503. 534. 539.

1. The grant of a menial office in the House of Lords for a terms of years liable to creditors, and a daily fee or allowance, held to be also subject to their demands.

Schellinger v. Blackerby, 347

2. Voluntary agreement by husband, good against his executors, though not against creditors.

Attorney-General v. Wharwood, 534. 539

See **BANKRUPT. CONSIDERATION. COPYHOLD. DESTOR. ELEGIT. INJUNCTION. PARTIES. PARTNERSHIP. PURCHASER. RENTS AND PROFITS. SATISFACTION. SETTLEMENT VOLUNTARY. TESTAMENTARY ACT. WITNESS.**

CROSS REMAINDERS—102.*See* JOINT-TENANTS.**CURTESY—174. 176. 298. 299. 307.**

There must be a seisin in law or equity to intitle husband to be tenant by curtesy.

Hearle v. Greenbank, 398, 9. 307

See also **BARON and FEME**, and **EQUIT.**

CUSTOM—413. 459.*See* **PRESENTATION and USAGE.****D.****DAUGHTERS—90.***See* **GUARDIAN and Ward.****DEBT—49. 51. 126. 173. 212.***See* **HEIR. LAPSE. LENGTH OF TIME.***PURCHASER. SATISFACTION.***DEBTOR and CREDITOR—77. 105.**

On the marriage of *A.* his sister advances him £600 to make a present to his wife, and *A.* procures his father to give her a bond for the amount payable at a month after his death. *A.* pays his sister interest during his father's life-time, and for the month afterwards. On a bill by the sister against the representatives of her father and her brother; held a debt on the estate of the father, not to be indemnified by *A.* And the plaintiff was also decreed her costs out of her father's estate. *Aliter*, if such a transaction had been between strangers. Accounts, memoranda, &c. of the father read in favour of his representatives, although objected to by the other defendant as likely to affect him. How answer of one defendant may affect another defendant.

Hill v. Ballard, 77*See* **PARTIES.****DECREE—163. 211. 214. 286. 496. 543.**

1. Decrees equal to judgments at law.

Martin v. Martin, 214

2. Decree not equal to judgment to affect lands though it is in course of administration.

Atley v. Powis, 496

See **APPOINTMENT. EQUIT. INJUNCTION. PRACTICE.**

DEEDS—195. 235.*See* **EVIDENCE. ISSUE.****DELAY—192.***See* **NEW TRIAL.****DELIVERY—314.***See* **ELECTION.****DEMAND—51.***See* **LENGTH OF TIME.****DEMURRER—37. 38. 56. 205. 246. 247. 248. 427. 494. 504. 542.**

1. Demurrer to discovery of defendant's title under a settlement, in contradiction to which plaintiff claimed, overruled, being unsupported either by answer or plea to a specific charge in the bill.

Stroud v. Deacon, 37

2. Demurrer allowed to a bill for payment of wages of knights of a shire; the remedy being at common law.

Shepherd v. Cotton, 38

3. Demurrer lies to a bill for discovery of an assignment of a lease without licence, if it does not expressly waive the forfeiture.

Lord Uzbridge v. Staveland, 56

4. Demurrer to information as subjecting defendant to pains and penalties. A demurrer may be put in after a plea is over-ruled.

East India Company v. Campbell, 246

5. Demurrer is dilatory; a plea not.

Ibid. 247

6. Demurrer to bill of interpleader. Affidavit to bill of interpleader need not swear that it is at plaintiff's own expense.

Metcalf v. Hervey, 248

7. *Quare*, Whether a demurrer will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter, on account of plaintiff not having obtained leave of the court, and made the usual deposit.

Cole v. Gibson, 504*See* **COSTS. PARTITION. PLEA.****DENIAL—66. 95. 97. 125.**

Though one witness cannot sustain a suit against a distinct denial by answer, the latter must be precise and positive.

Arnot v. Bisce, 95. 97

Vide **ANSWER.** *S. P. Roach v. Kennegal*, 125.

DEPOSITION—62.*See* **NOTICE.****DESCENT—146.***Vide* **HEIR.****DESTRUCTION—235.***See* **EVIDENCE.****DEVISE and DEVISEE—21. 32. 142. 171. 271.**

See **INHERITANCE. PROFITS. RECEIVER. TRUST. WILL.**

DISCOVERY—249.

Bill lies to discover the title of a person bringing ejectment, and to see if it is not in some other.

Metcalf v. Hervey, 249**DISMISSAL—43. 72.***Vide* **CHARITIES.****DISTRESS—171.***See* **EQUIT.****DISTRIBUTIONS, (STATUTE OF)—16. 17. 83. 156. 201. 230. 333. 334.**

1. Advancement on the statute of distribution or custom of London is just the same.

Elliott v. Collier, 16

2. Grand-daughter of the sister, and the daughter of the aunt of the intestate are in equal degree.

Thomas v. Kitterliche, 333

3. This court is to determine by same rules as to distribution, and legacies as the court Ecclesiastical.

Ibid. 334

DISTRIBUTIONS, (STATUTE OF)—
(continued.)

4. The rules of computing degrees different in the civil from the canon law; our courts compute by the former.

Ibid. 334

See POSTHUMOUS CHILD and RELATIONS.

DONATIO INTER VIVOS.

Donatio inter vivos must be absolute.

Peacock v. Monk, 133

See VOLUNTARY DEED, and TESTAMENTARY ACT.

DONATIO MORTIS CAUSA—314 316.

See ELECTION.

DOWER—54. 320. 262.

1. Devise of residue of personal estate to his wife, bars not her claim to dower.

Ayres v. Willis, 230

2. Dower.—Satisfaction.—Court, in taking general accounts, making an allowance to widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them.

Graham v. Graham, 262

See COPYHOLDS.

E.

ECCLESIASTICAL COURT—288. 325. 334.

See DISTRIBUTIONS, (STATUTE OF PROHIBITION, and RECOVER.

EJECTMENT—249. 495.

After leave given to bring an ejectment, a new ejectment cannot be brought without leave. *Sands v. Sands*, 495

See DISCOVERY.

ELECTION—121. 122. 234. 238. 258. 260. 306. 314. 323.

1. Claimant under will must admit the whole. *Allen v. Poulton*, 112

2. A person taking a benefit in personal or real estate under a will, must abide by it *in toto*. Therefore an unsundered copyhold decreed to pass.

Cookes v. Hellier, 234

3. See *Kirkham v. Smith*, 258 and 260, and TITLE TENANT IN TAIL.

4. A will void as to land: heir at law may, notwithstanding, claim a legacy. *Hearle v. Greenbank*, 306

5. Deed-poll not delivered, but operating at the death of grantor, and a bond given in favour of a natural daughter. She was put to her election.

Johnson v. Smith, 314

6. A. agrees to settle £100 *per ann.* on intended wife; falling sick devises £100 *per ann.* to her; recovering marries her, and the settlement is carried into execution; she can take but £100, and parol evidence admitted to prove the intent. *Mascal v. Mascal*, 33

See COPYHOLDS and MISTAKE.

ELEGIT—250.

The creditor under it, is to account for profits really received; and not only according to the extended value.

Owen v. Griffiths, 250

EQUITY—37. 48. 70. 83. 126. 161. 169. 171. 2. 174. 5. 7. 232. 249. 251. 278. 286. 287. 319. 339. 339. 341. 344. 5. 387. 483. 556.

1. The rule that he who will have equity must do it, holds not so as to tack together things independent, but the court will lay hold of any circumstance for it, as danger from absconding or living abroad. *Shish v. Foster*, 88

2. Bill for an account and share of prize money dismissed; the sum being certain, and the remedy at law against the prize agents.

Ogle v. Haddock, 161

3. Money considered as land to effectuate the general intentions of testator.

Johnson v. Arnold, 160

4. Bill of equity lies for payment of an entire rent out of a manor, where there are no demesne lands on which to distress; but it seems that the lands must be indisputably of greater value than the rent.

Duke of Leeds v. Powell, 171

5. Where from confusion of boundaries no remedy by distress, the court will relieve.

Duke of Leeds v. Powell, 172

6. Where money considered as land, and when not; and where decreed to be paid. *Cunningham v. Moody*, 175

7. There may be a tenancy by the curtesy of an equity; as of money to be laid out in land of inheritance. *Id.* 174. 176

8. Decree of *Exchequer* that a will is well proved, which is afterward found forged here; this court will decree that no use shall be made thereof.

Barnesley v. Powell, 286

9. Equity releases against usurious, but no other illicit contract.

Henkle v. Royal Exchange Assurance Company, 319

10. No relief in equity on lost instrument, where no affidavit of the loss, and no offer of indemnity. As to action on note payable to A. or bearer. And as to action on lost bond. Modern practice of courts of law in dispensing with *proferet*. This by no means destroys or affects the ancient and acknowledged jurisdiction of courts of equity.

Walmsley v. Child, 341, and *note*.

11. Where one may come into equity upon a loss notwithstanding a remedy at law. *Ibid.* 344

12. Where affidavit of the loss necessary. *Ibid.* 345

13. Difference in action at law upon the loss of a bond and a note. *Ibid.*

EQUITY—(continued.)

14. Purchaser of an equitable title to a rent-charge, claiming against some purchasers of the land for a valuable consideration without notice, must try his title at law, in the name of his vendors. What amounts to notice. Draft of a deed, traced into possession of defendant's family, very good evidence. Where a party may come into equity on the loss of a deed. New practice at law of dispensing with *proferi*. Bill retained for twelve months, with liberty to bring an action, &c.; but afterwards dismissed voluntarily without a trial. As to dispensing with *proferi* of a bond at law. Evidence as to loss of deed.

Whitfield v. Fausset, 387

See ACCOUNT. APPRENTICE. BARON and FEME. BOND. CHARGE. DENYER. DISCOVERY. ESTATE. REAL. FRAUD. LIMITATIONS (STATUTE OF.) MISTAKE. PROBATE. SURETY.

ERRONEOUS DESCRIPTION—255.

Legacy of stock, erroneous description. Satisfaction. Husband devises to his wife £700 *East India* stock, having none; but there was £700 Bank stock, to the surplus of which the wife was intitled as an executrix after payment of her testator's debts; and which the husband afterward transferred in his own name. The £700 Bank stock shall go to the wife, being an erroneous description. *Deor v. Geary*, 255

ERROR—207. 255.

See APPEAL.

ESTATE—10. 70. 226. 228. 271.

1. Devise of all the remainder of testator's goods and real estates, will pass all his interest and the inheritance in the lands, including reversions; although the devisee had a devise of an estate for life in part of the latter.

Ridout v. Payne, 10

2. Money to be laid out in land, considered as land. *Sperling v. Toll*, 70

3. *Estate*, when used generally, includes not only the lands or thing, but also the estate or interest, so if *in* or *at* such a place is added; but if it is further added in the occupation of particular tenants, Q?

Goodwyn v. Goodwyn, 226. 228

See COPYHOLDS. CONSTRUCTION, and WILL.

ESTATE FOR LIFE—142.

See TRUSTS.

ESTATE-TAIL—24. 142.

Devise to *A.* for life, with power for trustees to settle a jointure on his wife; and subject thereto in strict settlement on the issue of such marriage; *but, if A. should die without any issue of his*

body, then over. The latter words give him an estate tail by implication.

Allenson v. Clitheroe, 24

See also TRUST.

ESTOPPEL—230. 453.

See in *Pear v. Lord Baltimore*, 453, and *BARON and FEME*.

EVIDENCE—2. 6. 58. 62. 66. 77. 177. 192. 231. 235. 274. 317. 323. 398. 9. 413. 456. 7. 505.

1. Evidence the same here as at law on a casual destruction of deeds; but otherwise where a spoliation.

Cookes v. Hallier, 235

2. Answer of heir *believing that a will was made*, will not prevent the necessity of its being proved.

Potter v. Potter, 274

3. Where defendant's answer in another cause may be read.

Whitfield v. Fausset, 388

4. A deed lost may be proved by circumstances, first shewing that it once existed, and next, that it is lost or cannot be come at. *Ibid.* 389

5. A draft of a deed traced into possession of defendant's family, very good evidence. *Ibid.* 388, 9

6. Evidence. The best to be given the nature of the thing admits. All deeds, &c. must be proved, unless in hands of adverse party, or destroyed: then parol evidence of contents allowed.

Cole v. Gibson, 585

See AGREEMENT. ANSWER. DEFECTOR and CREDITOR. FRAUD. MISTAKE. NEW TRIAL. NOTICE. PRESUMPTION.

TRUST-RESULTING. WILL.

EVIDENCE (PAROL)—231. 322.

Devise to a testator's nearest poor relations. Parol evidence admitted to shew that testator knew he had such in *Salop*, but no farther; not to prove declarations or instructions whom he meant by the written words of the will.

Goodinge v. Goodinge, 231

See ELECTION.

EXAMINATION, Separate—174.

See BARON and FEME.

EXCEPTIONS—172. 189.

See GRANT and PRACTICE.

EXECUTION—196.

See SHERIFF.

EXECUTORY DEVISE—268. 491.

1. See *Hopkins v. Hopkins*, 268, and title INHERITANCE.

2. Where an executory devise "all the rest and residus" include intermediate profits.

Gibson v. Lord Montfort, 491

EXECUTOR—9. 46. 75. 100. 123. 196. 127. 212. 282.

1. Executor and residuary legatee undertakes to pay a legacy not in the will;

EXECUTOR—(Continued.)

he shall be bound thereto, not personally, but out of the residue of the assets. *Reech v. Kennegal*, 123

2. Executor bound to set apart a fund to answer future demands under a contract. *Johnson v. Mills*, 282

See ASSETS. CHARITIES. CONDITION. COSTS. HEIR. PARTIES. VESTING.

EXONERATION—51. 52. 86. 100. 477. 482. 521.

1. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had covenanted to pay them.

Leman v. Newnham, 51, 2

2. Settlement, on marriage, of estates, leasehold and others, subject to incumbrances. The issue of the marriage not intitled to have them disincumbered out of their father's assets.

Clarke v. Samson, 100

3. Real estate rendered by testator primarily liable.

Amesbury v. Brown, 477, 482

4. *Vide Peirs v. Peirs*, 521, and Title WASTE.

See also BARON and FEME, and FRAUD. EXTENT—483.

See INQUISTION.

F.

FACTOR—509. 510.

1. Plaintiff, a factor abroad, having exceeded the price limited for a purchase of hemp, the defendant, who objected to the contract, but afterwards reshipped, and disposed of some of it on a new risk, was ordered to account for the whole at the cost price.

Cornwall v. Wilson, 509

2. If factor exceeds orders on one part, and saves on another, the principal must take the good with the bad.

Ibid. 510

FEE—88. 495.

See ESTATE. INHERITANCE. LIMITATION TOO REMOTE, and RESIDUARY DEVISE.

FINE 230. 289. 387. 390. 391.]

As to a fine of land not barring a rent-charge issuing out of the land.

Whitfield v. Fausset, 387. 390, 1. and note to 391

See BARON and FEME, and FRAUD.

FOREIGN COURT—298.

See LUNATIC.

FORFEITURE—56. 314.

Gift over, on A.'s refusal to marry B. The forfeiture held not to take place from an offer being declined once or twice, but from a more formal acknowledgment. *Johnson v. Smith*, 314

See DEMURRER.

FORGERY—119. 284. 286. 287.

Will of personal estate examinable in ecclesiastical court; but this court will avoid, if possible, the sending it there after the will has been found forged by a jury, which bound the real estate, and will go as far as they can to decree the parties trustees.

Barnesley v. Powell, 119. 284. 287

See also EQUITV.

FRAUD—2. 36. 37. 86. 87. 96. 277. 289. 456. 7. 556.

1. Plaintiff having prevented the fulfilment of an agreement in favour of the defendant M. for purchasing the assignment of a mortgage, by obtaining it himself at an advance after notice, not allowed to take advantage of it; being *malafides*, evidence therefore of a parol agreement read against him under these circumstances.

Scott v. Merry, 2

2. Admission of a debt obtained by fraud or force, not set aside on motion, but may be a ground for a new bill, although the former still depending.

Townsend v. Lowfield, 36

3. On positive proof of fraud, court will often direct the master not to allow any sum as paid which is not specifically proved. *Ibid.* 37

4. Settled estate disencumbered of a charge in fraud of a marriage agreement.

Troughton v. Troughton, 86

5. Conveyance of an estate to which defendant is intitled in equity, suspended till an account of the rest of the estate taken in the original suit, from the danger of the plaintiff's losing his demand. *Shish v. Foster*, 87

6. Decree against the right of a person practising a fraud though he was an infant, and could not have been bound by a matter of contract.

Arnot v. Biscoe, 96

7. Relief may be against a decree obtained by fraud. Against a probate obtained by fraud, relief must be here, where the party will be decreed a trustee.

Barnesley v. Powell, 120

8. Bonds in fraud of marriage agreements set aside on public policy.

Debenham v. Ox, 277

9. Acknowledgment of satisfaction decreed here on a judgment obtained against conscience. *Ibid.* 239

10. A person obtaining a fine by fraud decreed a trustee. *Ibid.*

11. In cases of fraud the remedy in equity does not die with the person.

Garth v. Cotton, 536

See also MISTAKE.

FRAUDS, (STATUTE OF)—82. 297.

See AGREEMENT and PLEA.

FREE-BENCH—54.*See* COTTMOLDS and DOWER.**G.****GARDENS—188.***See* INJUNCTION.**GIFT—379.***See* GRANT and IMPOSITION.**GRAND-CHILDREN—195.***See* ISSUE.**GRANT—100. 172. 235.**

Exception repealing a whole grant is void.

Duke of Leeds v. Powell, 172*See* VESTING and WARRANTY.**GUARDIAN and WARD—87. 90. 157. 159. 160.**

1. A direction in a will that the wife should have the education, may amount to a devise of the guardianship.

Mendes v. Mendes, 91

2. The guardianship of daughters determined by marriage, not so of sons.

Ibid.

3. Marriage of a ward of court to a foreigner out of the realm.

Roach v. Garvan, 157

4. Guardian will not be appointed after a marriage; nor discharged because of a marriage. But without discharging guardians, orders regulating their conduct may be made.

Ibid. 160

5. Liberal allowance for maintenance where a guardian or father is in distressed circumstances.

*Ibid.**See also* FRAUD, and WARD of COURT.**H.****HEIR—48. 73. 74. 86, 7. 148. 198. 212. 230. 256. 274. 298, 9. 308. 324. 409.**

1. Costs paid to disinherit heir raising a fair question.

Stephens v. Trueman, 74

2. Where heirs of the body words of purchase.

Bagshaw v. Spencer, 146

3. In what respects the proceedings against heir for debt of ancestor agrees with or differs from the proceedings against executor or administrator.

Martin v. Martin, 212*See also* AGREEMENT. AGREEMENT-MARRIAGE. BARON and FEME. CONDITION. CONTINGENT INTEREST. ELECTION. EVIDENCE. REAL ESTATE. RECEIVER. TACKING.**HEIR-LOOMS—197. 201.***See* VESTING.**HIGHWAY ACTS—188.***See* INJUNCTION.**HYPOTHECATION—443.***Vide* SHIP.**I.****ILLUSORY APPOINTMENT—58***See* POWER.**IMPLICATION—24.***See* ESTATE TAIL.**IMPOSITION—172. 379.**

Voluntary conveyance, by one lately come of age, to an agent, of a reversion of no great value, for a nominal consideration of £189, and containing covenants as in the case of a purchase, not absolutely rescinded, as not being a case of frauds, but the transaction modified by decree, that the agent should release the covenants at his own expence, and recite the impropriety of them as referable to a gift.

Cray v. Mansfield, 379*See also* FRAUD, and POST OBIT SECURITY.**IMPROVEMENT—115.***See* TITHES.**INCLOSURE—118.***See* MODUS.**INCUMBRANCE—31. 51. 87. 93. 95. 100. 258. 261. 477.**

1. Tenant for life must keep down the interest of incumbrances, although the whole of the rents and profits are exhausted by it. The court, however, will direct a reasonable maintenance for him out of the profits, if otherwise unprovided for.

Revel v. Wilkinson, 93

2. Tenant in tail subject to an incumbrance, suffers a recovery of part, sells part, and exchanges part: the land taken in exchange not subject to a contribution of the incumbrance, the whole of which must be borne by the remainder.

Kirkham v. Smith, 261*See* BARON and FEME. EXONERATION. JOINTURE. PURCHASER. SUPPRESSION. VERIL. TENANT IN TAIL.**INDEMNITY—77.***See* DEBTOR and CREDITOR.**INFANT—28. 96. 192. 298. 303, 4. 308. 9. 459. 60. 544. 545.**

1. Parol demurs only where the estate descends.

Beaumont v. Thorpe, 28

2. As to parol demurring.

Parsons v. Lanoe, 192

3. Infant at seventeen may devise personal estate. Feme covert may dispose of her separate estate.

Hearle v. Greenbank, 303

4. A power given generally cannot be executed by infant. What powers infant may execute.

Ibid. 304

5. Infancy a stronger disability than coverture.

Ibid. 305

6. A sum of £96 paid to guardian of an infant tenant in tail for rebuilding a copyhold tenement that had been burnt down, but which had never been so applied during the infant's life, held to belong to the succeeding remainder-man in tail, subject to a deduction of interest upon a larger sum at which the loss was computed. Such interest held to

INFANT—(continued)

belong to the personal representatives as a compensation for the loss of the rents and profits sustained by the infant, who could not alien. Question as to infant tenants in tail.

Rook v. Worth, 459, 60

7. Infant's property not to be changed.

Ibid. 461

See also **BARON and FEME. FRAUD. NEW TRIAL. REFERENCE.**

INFLUENCE—19. 87. 276. 503.

Bond given as a reward for using influence over another's estate, for benefit of the obligor; decreed to be delivered up without costs.

Debenham v. Oz, 276

See **AGREEMENT. FRAUD. MARRIAGE-BROGAGE. MISREPRESENTATION.**

INFORMATION—77, &c.

See **CHARITIES and PRACTICE.**

INHERITANCE—10. 21. 58. 176. 268. 275.

1. Devise to *A.* in fee, with directions to settle on descendants of his mother for their several lives, &c. *A.* may limit an inheritance to effectuate the general intent.

Godolphin v. Godolphin, 21

2. Where inheritance is in abeyance.

Cunningham v. Moody, 174. 177

See **ABEYANCE. EQUITY. and BARON and FEME.**

3. Contingent remainder upon executory devise. Rents and profits undisposed of belong to the owner of the inheritance, or persons intitled to the enjoyment.

Hopkins v. Hopkins, 268

4. The purchase of houses in London will not answer a covenant to purchase lands of inheritance.

Lewis v. Hill, 275

See also **FREE and POWER.**

INJUNCTION—188. 211. 264. 396. 476. 520. 543.

1. Garden grounds used for trade as much protected by the Highway acts, &c. as private gardens. Plaintiff, therefore, quieted in possession by injunction against the commissioners.

Hughes v. Morden Coll. 188

2. Injunction against creditors suing at law after a decree to account.

Martin v. Martin, 211

3. Injunction before answer to restrain other ferry-boats, denied.

Anon. 476

4. Granted to stay ways. Or where the right appears of record.

Ibid.

5. Injunction against stepping lights until after trial at law.

Rider v. Bentham, 543

The court will not by interlocutory order direct any building, &c. to be pulled down.

Ibid.

See also **PRACTICE and WASTE.**

INROLMENT—205. 336.

1. Inrolment of decrees set aside under circumstances. Not, however, if made upon the merits.

King v. Square, 306

2. Inrolment of decrees vacated being done too quick, though strictly regular.

Wright v. Wright, 328

INSURER—98.

Insurer after satisfaction stands in place of the assured as to the goods, salvage, and restitution in proportion for what he paid.

Randal v. Cockran, 98

INTAIL—133. 225.

See **COPYHOLDS. ESTATE TAIL. and PERSONAL ESTATE.**

INTENTION—106. 169. 227.

See **CONSTRUCTION. EQUITY. and MISTAKE.**

INTEREST—75. 93. 99. 118. 171. 209.

211. 277. 307, 8. 310. 311. 427. 428.

477. 483. 495.

1. A debt by covenant in marriage-articles, and no mention of interest: the court would not reduce it lower than 5 per cent. The like interest allowed on a legacy for mourning.

Swynfen v. Swensen, 99

2. Daughters portions by will charged on personal, then on real estate, with interest for maintenance; so far as the personal deficient, they carry but 4 per cent. [*Sed contra* now as to maintenance.]

Lord Trimbleston v. Coll. 277

3. It was the rule in *Lord Hardwicke's* time to give interest at 5 per cent. on legacies out of personal estate, and 4 per cent. out of real. It has now long since been altered, and the general rule is, that they shall all carry interest at 4 per cent. from the end of a year after the testator's death. The case of maintenance is an exception.

Bryant v. Speke, 171

4. Where the court will, or will not, give interest for legacy before it is payable.

307

5. Where interest is to commence from the death of testator, and not from the end of a year after.

Beckford v. Tobin, 310

6. Where the court will give less than the legal interest for a legacy charged on personal estate; as where the fund did not produce so much, and an intention to separate the bulk of the estate.

Ibid. 311

See **MAINTENANCE**, and 308.

7. Money charged on an estate in *Norris* held to carry only *English interest*. This sum, which was charged in favour of *W.* held to be included in the bequest of a larger sum to *W.'s* younger children, the testatrix supposing that they were entitled to the charge, although

INTEREST—(continued.)

it was not the case, and decreed that no more should be raised than the sum bequeathed. *Stapleton v. Conway*, 427

8. Interest sometimes given for the arrears of an annuity where frequent demand made. *Ibid.* 428

9. Covenant before the act, reducing the rate of interest to pay 6 per cent. not prejudiced by the act; but interest turned into principal, by the course of the court, was directed to carry interest at 5 per cent. only, from the passing of the act. Interest by course of the court, discretionary.

Asley v. Powis, 483

10. Rate of interest. Charge on real estate where the court has jurisdiction, as in case of administration of assets under a charge, interest by course of the court is discretionary. Interest which has been turned into principal, carried interest at 6 per cent. until the time when the rate of interest was altered by act of parliament, but no longer, although the original principal did by virtue of a covenant. The acts varying the rate of interest do not extend to antecedent contracts. *Ibid.* 495

See also ASSETS. BARON AND FEME. INCUMBRANCE. MAINTENANCE. VESTING.

INTERPLEADER—248.

Affidavit to bill of, need not state that the proceeding is at the plaintiff's own expense. *Metcalf v. Hervey*, 248

INQUEST—268.

Where notice should be given of the issuing a commission for an inquest.

Rex v. Daly, 268

INQUIRY—69.

See ANSWER.

INQUISITION—483.

Dum clausit extremum issued for a simple contract debt to the crown.

Rex v. Curtis, 483

IRELAND—64.

As to the registry acts for Ireland.

See page 67, note.

ISSUE—28. 195. 200. 201. 209.

1. Deed, construction of—Grand-children and great grand-children included by the term "issue;" and the word "children" following it, explained as meaning "issue" likewise.

Wyth v. Blackman, 195

2. Extent of the word children.

Ibid. 201

4. Intent of declaration of trust to provide for the several stocks and at distance of time: children extended to issue in general.

Ibid. 200

See LEGITIMACY.

ISSUE AT LAW—119, &c.

See FOREBAY. MODUS

J.

JOINT-TENANT—13. 102. 165. 166. 542.

1. Devise to trustees as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint-tenants; this not a joint estate, but to be construed as near as it may be, so that the conveyance must be at twenty-one respectively, with cross remainders.

Marryat v. Townley, 102

2. The law formerly favourable to joint-tenancies.

Stones v. Hourly, 166

Vide SURVIVORSHIP, and TENANT IN COMMON.

JOINTURE—31.

Parties entitled to an estate, confirming a jointress's settlement, are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement.

E. Portsmouth v. Lady Suffolk, 31

JUDGMENT—214.

See DECREE.

JUDGMENT AT LAW—496.

See DECREE.

JUDGMENT CREDITOR—163.

See TACKING.

JURISDICTION—77. 159. 201. 204. 284.

341. 444. 446. 447. 454. 482. 470.

1. A question concerning the right and title to the *Isle of Man* may be determined here.

Earl of Derby v. Duke of Athol, 204

2. Jurisdiction of the court though submitted to by answering, yet if a writ of it appears at hearing, no decree.

Penn v. Lord Baltimore, 446

3. Original jurisdiction as to bounds of proprietary governments in K. in council. But by the contract of parties brought within the jurisdiction of courts of equity. *Ibid.*

4. No appearance or answer will give a jurisdiction to a limited court.

Green v. Rutherford, 470

See AGREEMENT. CHARITIES. COLLEGE. PLEA, and WARD OF COURT.

L.

LACHES—521. 530.

Bill for a strict settlement after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed. *Porter v. Phillips*, 530

See also LENGTH OF TIME.

LAND—171. 174. 198.

See BARON AND FEME. EQUITY. FUTURE, and REAL ESTATE.

LAPSE—43. 49. 70. 80. 85. 135. 207. 215. 321. 2. 420.

1. A legacy out of real estate to be paid

LAPSE—(continued.)

within twelve months after the death of A. The legatee survives A. but one month; it does not lapse, but goes to the representative. *Hodgson v. Rawson*, 43

2. A woman by will forgives a bond-debt to her son-in-law, and desires her executor to deliver up the bond to be cancelled; this held not to be lapsed by his dying before the testatrix.

Sibthorp v. Maxton, 49

3. Executory trust for three for their lives, *as tenants in common*; if any died without issue living at their deaths, their shares to go to survivors; with contingent remainders in tail; and remainders over. Two of them dying in testatrix's life-time, held their shares lapsed, and went over. *Sperling v. Toll*, 70

4. A wife having power to appoint £4000 to any of her kin; and, for want of appointment to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of £100. She then bequeathed to her niece S. all the rest and residue of what she had power to dispose of. The nephew dying in her life-time, the appointment *as to him* was void, but not so as to the annuitant, and the remainder was held to pass by the above residuary bequest.

Oke v. Heath, 135

5. Appointment by will under a power, void by the death of appointee in life of testatrix. *Ibid.* 139

6. Legacy "paying an annuity;" legatee dies in life of testator, the annuity still subsists. *Ibid.* 141

7. Testator "desires" J. "to leave" D. £500, at her death out of the money bequeathed her; held to amount to a legacy from the original testator; and not to lapse by D.'s death in J.'s life-time, he having survived the testator.

Medlicot v. Bowes, 207

See also CHARITIES. CONDITIONAL LIMITATION. RESIDUE, and VESTING.

LEASEHOLDS—271. 428.

See CONTRIBUTION and WILL.

LEGACIES—38. 41. 47. 49. 89. 99. 106. 118. 122. 207. 230.

Where legacies sink; where transmissible.

Hodgson v. Rawson, 46

See CHARGE. CONSTRUCTION. INTEREST. LAPSE. MISTAKE. PORTION. RENTS and PROFITS. SATISFACTION. SPECIFIC LEGACY. STOCK. VESTING.

LEGAL ESTATE—187. a

See TRUST.

LEGITIMACY—28.

Legitimacy—Issue.—New trial.

Baker v. Hart, 28

LENGTH OF TIME—61.

Where no demand of principal or interest

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for twenty years, satisfaction will be presumed; except in cases of mortgages; mortgagee is supposed continuing in possession, and mortgagor tenant at will to him.

Leman v. Neunham, 51

See also LACHES.

LIABILITY—173. 282.

See APPROPRIATION. EXECUTOR. OWNER. PURCHASER and SHIP.

LIEN—154. 239. 242. 244. 248. 456.

No lien on a ship, or proceeds from sale of it, for repairs done, except in course of a voyage; liberty given to bring an action *as to the personal liability* of the part-owners who received the benefit.

Burton v. Snee, 154

See BANKRUPT and PARTNERSHIP.

LIMITATION TOO REMOTE—88. 519.

Devise to one and his heirs, and if he died without heirs, remainder to his half-brother; the devise being of 'a clear fee, the remainder void.

Tilburgh v. Barbut, 89

See also REMOTE LIMITATION.

LIMITATIONS, (STATUTE OF)—178. 344.

1. Bill lies by assignee of bankrupt for account and delivery of goods pledged by the bankrupt notwithstanding the statute of limitations.

Kemp v. Westbrook, 278

2. Pawnee has time during life, where no time given for redemption. Remainder-man not bound to enter on forfeiture of the particular tenant, and if he comes within his time after the remainder attached, the statute of limitations will not bar. In what case a bill may be for redemption of pledged goods.

Ibid.

3. Acknowledgment to pay takes the debt out of statute of limitations. 344

LIS-PENDENS—244.

See NOTICE.

LIVINGS—80. 413.

See CHARITIES and PRESENTATION.

LONDON—275.

See COVENANT, INHERITANCE and SATISFACTION.

LONDON, (CUSTOM OF)—15.

LOSS—341. 344. 392. 482.

Where on the loss of a deed you may come into equity.

Whitfield v. Fausset, 392

See EQUITY and WASTE.

LUNATIC—82. 298.

One found *non compos* before the senate of *Hamburgh*, a mortgagee within *stat.* 4 G. 2. c. 10. and will be directed to convey

Ex parte Lewis 288

See also AGREEMENT.

M.

MAINTENANCE—15. 93. 160. 171. 209. 211. 277. 308. 511. 517.

1. Interest of a legacy from one year only after testator's death, unless by a father to a child. Where interest of legacy should not accumulate.

Coleman v. Seymour, 211

2. Construction of will. Interest of legacy from death of testator, on the manifest intent as to maintenance.

Beckford v. Tobin, 308

3. If on voluntary settlement by father an account is directed for the child, maintenance to be deducted.

Williamson v. Codrington, 511, 517

See **ADVANCEMENT. BARON AND FEME. GUARDIAN AND WARD. INCUMBRANCE. INTEREST. VESTING. VOLUNTARY DEED.**

MAN, (ISLE OF)—201. 204.

See **JURISDICTION.**

MANOR—177.

A manor may be in reputation, though no demesnes, which pass by the word *manor*.

Duke of Leeds v. Powell, 172

MARRIAGE—90. 153. 157. 159. 160. 189. 314.

1. Marriage in foreign court conclusive by the law of nations.

Rosch v. Garven, 159

2. In what cases a sentence in court ecclesiastical will bind the rights of marriage.

Ibid.

See **FORFEITURE, GUARDIAN AND WARD. REVOCATION.**

MARRIAGE AGREEMENT, and MARRIAGE ARTICLES—73. 150. 238.

Difference in construction of marriage articles and trusts in a will.

Bagshaw v. Spencer, 150

See **AGREEMENT. MARRIAGE, and MISTAKE.**

MARRIAGE-BROCADE—503.

Marriage brocade. Articles before marriage to secure annuity out of wife's estate to her servant, who had influence over her; and bond for £130, the bond delivered up and a new grant of the annuity after marriage. The consideration of the bond and annuity directed to be tried.

Cole v. Gibson, 503

MARSHALLING—108. 312.

See **ASSETS and CHARITIES.**

MISREPRESENTATION—407.

Undue influence and misrepresentation—Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grandmother giving other monies in trust for the infant, and disavowing that he should not be so charge-

able. Stated accounts set aside; the items being very gross, and the settlement obtained from a person just come of age under a misrepresentation. Bond obtained from the infant's grandmother for the amount of a bill of fees and disbursements, directed to stand as a security for monies justly due on account, and the bill ordered to be taxed.

Brown v. Frings, 407

MISTAKE—106. 126. 238. 245. 317. 400. 458, 7.

1. Mistake in the computation of a legacy rectified according to the intention, though contrary to the words.

Milner v. Milner, 106

2. Equity relieves against bargains made under a misconception of rights.

Bingham v. Bingham, 126

3. Election. Satisfaction. Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles *certatum*, and both made before marriage. The plaintiff, however, having taken a benefit under the will which he disputed, held to have made his election; and decreed to give up part of the settled estate in satisfaction.

Roberts v. Kingsley, 238.

See also **FRACTION**, 246.

4. Policy of insurance. Bill to rectify it according to the intent dismissed, there not being evidence to vary the contract.

Henkle v. Royal Exchange Assurance Company, 317

5. Articles of agreement rectified by the minutes. Admission of parol evidence where fraud or surprise.

Baker v. Paine, 456

6. Relief against agreement made under a misconception of right. Agreement as to the distribution of personal estate set aside, although ratified; the value appearing much greater than was known to the plaintiff at the time.

Cocking v. Pratt, 400

MODUS—3. 39. 117. 118.

1. Not necessary to use the word *modus* in laying it. Nor a particular day of payment. A *modus* may be overturned for rankness, if for a specific thing; if otherwise will be sent to trial.

Richards v. Evans, 39

2. Common enclosed by agreement covered by former *modus*.

Stockwell v. Terry, 117

See **PLEADING**, 1.

MONEY—70. 169. 174. 5. 6. 199.

See **BARON and FEME. EQUITTY. REAL ESTATE.**

MORTGAGE—51. 86. 7. 160. 1. 163. 173. 298. 348. 358, &c. 402. 428. 443.

1. Redemption resisted, and mortgagee

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ordered to pay costs.

Baker v. Wind, 160

2. Where a clause of redemption is in a separate deed, the court adheres to it strictly to prevent the equity of redemption from being entangled to the prejudice of mortgagor.

Ibid. 161

See Ryall v. Roules, 348. 358, &c.

See COSTS. LENGTH OF TIME. LUNATIC. PURCHASER. REDEMPTION. REVOCATION. SHIP. TACKING.

MORTMAIN—32. 108. 178. 218. 224, 5. 320. 534.

1. Will made before the mortmain act good, although the testator died after it.

Attorney-General v. Lloyd, 32

2. Devise before the mortmain act, and a codicil after it, not disturbing the charitable trust, but devising to the same use, and adding two more trustees, is not rendered void, although the codicil attempted to unite another piece of land in the trust. The codicil no revocation.

Willett v. Sandford, 178

3. The court refused to effectuate an order, confirming the Master's report, for laying out money in land for a charity, where the nature of a devise, on which it was founded, made an opening to evade the statute of mortmain.

Attorney-General v. Day, 218

4. Devise to a charity before the statute of mortmain, of copyholds *un surrendered*, held good. Copyholds pass by a will without any witness. As to where the courts have favoured valid bequests and donations for charitable purposes.

Attorney-General v. Andrews, 225

5. Conversion of realty into personality. Residuary bequest. Real estate directed to be sold, and together with personal, applied (*inter alia*) to charitable purposes, and "that the trustees should 'place out all the residue of testator's estate and the interest thereon, on securities, and divide it,' &c." Held, first, that the bequest as to the charity was void: and next, that the whole, as to other matters, was turned into personality. Residuary bequest of personality includes every thing; as a void legacy, or one that has lapsed.

Durour v. Motteux, 320

6. Devise to a college not for academical or collegiate purposes, but merely to make testator's house unalienable, and that one of the fellows should live in it for ever. Lord *Hardwicke* at first thought it questionable whether this was a charity under the 43d of *Eliz.* and whether a good devise under the

mortmain act; and it was afterwards determined to be void. Right of the crown to direct the uses of an improper charity.

Attorney-General v. Whorwood, 534

See also CHARITIES.

MOTION—543.

See INJUNCTION AND PRACTICE.

MOURNING—99.

Legacy for, carried interest, 99.

Vide INTEREST.

N.

NEW TRIAL—28. 192.

No new trial where there must be the same issues, and no surprise, &c. on the former trial. Infancy no ground for it in such a case. Verdict, founded on evidence discovered since the answer put in, and contrary to it, is not thereby prejudiced. Length of time, on an application for a new trial, a very great objection, both at law and in equity.

Legard v. Daly, 192

Vide EJECUTION AND LEGITIMACY.

NOTICE—61. 62. 64. 66. 244. 268. 387. 392. 413. 556.

1. Party having notice through his agent, of sufficient to make him inquire as to the title, cannot protect himself by procuring the legal estate. Attorney, &c. may object to answer as a witness as to confidential communications.

Maddock v. Maddock, 61

2. Notice to an agent, as well as personal notice will affect the party, and the deposition of the agent will be allowed to be read.

Ibid. 62

3. Notice to an attorney of a prior conveyance unregistered will postpone a conveyance for the benefit of the principal which has been registered. Notice to agent is notice to a party.

Le Neve v. Le Neve, 64. 66

4. If on marriage settlement an agent is employed on both sides, both will be affected by notice to him. Nor is it material on whose recommendation or advice he was employed.

Ibid.

5. Though the register act vests the legal estate according to the prior registry, yet it is left open to all equity: and notice even to an agent of a prior purchase not registered will affect a subsequent purchase, though registered.

Ibid.

6. Whether the property of goods is affected by a *lis pendens*, Q.

West v. Ship, 244

7. What will amount to notice.

Ibid. 387. 392

See also CONTINGENT REMAINDERS. EQUITY. INQUEST, and PRESENTATION.

O.

OFFICE—347.

See CREDITOR.

OWNER—443. 497.

See PARTNERSHIP and SHIP.

P.

PARENT—209. 230.

See CHARGE and VESTING.

PAROL—28. 192.

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PAROL AGREEMENT—141.

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PAROL EVIDENCE—323.

See ELECTION and EVIDENCE.

PARTIALITY—413.

See AWARD and PRESENTATION.

PARTIES—101. 105. 127. 131. 426. 449.

1. Objection for want of parties. To a bill by representative of the pawnee of a chattel against a third person, merely for a delivery of it, the owner need not be a party.

Saville v. Tugcred, 101

2. Where a creditor may make any other persons, beside the personal representative of the testator, parties.

Newland v. Champion, 105

3. Not necessary to make any other than the executor parties relative to the personal estate; since he sustains the person of the testator to defend the estate for himself; creditors and legatees.

Peacock v. Monk, 127. 131

See AGREEMENT and WITNESS.

PARTITION—494.

Bill for partition will lie as to tithes. Demurrer to such a bill over-ruled.

Baxter v. Knollys, 494

PARTNERSHIP—6. 239. 242. 244. 348. 456. 497. 499.

1. Bankruptcy. Representatives of partner entitled to set off debts, and have all allowances before the separate creditors of the other can take his share; and they have a lien for such demands.

West v. Ship, 239, 456

2. Partners continue joint-tenants in the stock notwithstanding it changes in the course of trade, and are seized *per my & per tout*, and, on account, each must have all allowances before a judgment-creditor of the other can come on the other's share: And surviving partner is considered as a trustee for representative of the deceased, who has a specific lien; but such lien may be lost by laches or consent to leave the goods in the power of the other, who afterward becomes bankrupt; which may bring it within 21 J. 1 c. 19.

Ibid. 242

3. A partnership lien is not confined to the original stock, but it is also to the produce. *Ibid.* 244

4. Partnership effects first applied to pay partnership debts. *Ibid.* 456

5. The doctrine in this case as reported, "that part-owners in a ship are partners, and liable *in solido*, for all goods furnished, and repairs done," has been over-ruled, on great consideration.

Doddington v. Hallet, 497

6. The clear balance only to be divided as a partner's share. *Ibid.* 499

See also AGREEMENT and BANKRUPT.

PART PERFORMANCE—82. 297. 441.

See AGREEMENT and PLEA.

PAWN—101.

See PARTIES.

PAYMENT—174.

See BARON and FEME.

PENALTIES—246.

See DEMURRER.

PERFORMANCE—1. 12. 541.

1. Vide SATISFACTION, 1.

2. Lessee covenanting to rebuild several houses, does not perform it, by rebuilding some and repairing others, although at a considerable expence. Issue directed of *quantum damnificatus*.

City of London v. Nash, 12

3. Purchase of copyholds not generally considered as a performance of a covenant to purchase and settle lands of inheritance.

Attorney-General v. Wharwood, 541

4. So likewise as to the purchase, &c. of houses in London.

Lewis v. Hill, 274

PERFORMANCE (SPECIFIC)—217.

See CONTRACT.

PERSONAL ESTATE—85. 133. 220. 485. 8.

- Devise of £400 to be put out on good security for T. B. that he may have the interest for his life, and for the heirs of his body: if he die without issue, then over. The whole property vests in the first taker, and the limitation too remote. *Butterfield v. Butterfield*, 133

See CONVERSION. EQUIT. INTAIL. REPUBLICATION. VESTING.

PIN-MONEY—See *Atton v. Atton*, 267.

PLATE—427.

See CONSTRUCTION.

PLEA AND PLEADING—3. 37. 39. 56. 105. 127. 164. 201. 205. 246. 7. 297. 401. 426. 7. 462. 535.

1. Vicar failing in a suit for tithes in kind, and a *modus* set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such a *modus*.

Carr v. Ball, 2

2. Plea of the statute against usury. £2000 lent on condition to pay in a

PLEA and PLEADING—continued.

year 2001. and the principal, or 2501. per ann. during borrower's life: not an usurious contract. Averment that the sum was above the legal interest necessary to support such a plea. *Wortley v. Pitt*, 164.

3. On a plea to the jurisdiction it must be shown what other court has jurisdiction.

Earl of Derby v. Duke of Athol, 201.

4. A plea may be allowed as to part: not so of a demurrer. [But see contra, 18 Ves. 472.] *Ibid.* 205.

5. A plea not a dilatory, though a demurrer is.

East India Company v. Campbell, 247.

6. Plea of statute of frauds to discovery of a parol agreement not allowed where part-performance.

Taylor v. Beech, 297.

7. Plea of a general agreement and composition of accounts good, without its being a minute strict settlement of items.

Bewell v. Bridge, 297.

8. Plea of inventory delivered and approved, and of agreement founded on it without fraud.

See *Cocking v. Pratt*, 401.

9. Where a plea proper; where a demurrer. *Avelyn v. Ward*, 426, 7.

See **WITNESS**.

10. Devise of a rectory to a college on trust (*inter alia*) to present the senior divine then fellow. Plea to jurisdiction, as being in the visitor, over-ruled.

Green v. Rutherford, 462.

11. Interrogating part of a bill must be supported by a substantive charge.

535.

See **DEMURRER**. **MODUS**. **PARTIES**. **WITNESS**.

POLICE (PUBLIC)—251, 276, 7.

See **BOND**. **FRAUD**. **INFLUENCE**.

PORTIONS—57, 208, 277.

See **CONSTRUCTION**. **INTEREST**. and **VESTING**.

POSSESSION—232.

See **ACCOUNT**.

POSSIBILITY—391, 411.

Possibility assignable in equity for valuable consideration, and love and affection to a child is a consideration in the second degree, and operates by way of agreement,*and will be made good like the case of defective execution of a power, or devise of copyhold without surrender.

Wright v. Wright, 409, 411.

See **CHOSE IN ACTION**.

POSTHUMOUS CHILD—85, 156.

1. A posthumous child within a provision in marriage articles for such children of the marriage, as should be living at the death of the father or mother. *Miller v. Faure*, 85.

2. Posthumous brother of the half blood shall take under statute of distribution. *Burnet v. Mann*, 156.

POST OBIT SECURITY—122.

Bond by A. in 1720 for payment in six months after his father's death, if he survived, otherwise to be void; the father then seventy, and dies in 1731, A. in 1734: no relief except against the penalty; there being no proof of imposition although suspicious circumstances in it.

Hill v. Caillovel, 122.

POWER—9, 23, 58, 59, 60, 139, 156, 174, 281, 298, 9, 304, 306.

1. Power to charge a particular sum reserved by owner of the inheritance not executed in his life-time, held to be executed in substance by his will, charging debts and legacies on all his real and personal estate though it did not refer to the power. Illusory trust. *Maddison v. Andrew*, 58.

2. Power of appointment by mother may be unequally distributed, but not so as to be illusory, unless there is a great misbehaviour. *Ibid.* 59.

3. Discretionary power of a parent to appoint, not being executed, does not devolve on the court. *Ibid.* 60.

4. Power reserved by the owner of an estate to be construed liberally, and no occasion to refer to the power if it is done in substance. *Ibid.* 61.

5. If a power is professed to be executed by a will, such instrument must have all the qualities of a will.

Oke v. Heath, 139.

6. Power coupled with an interest different from a naked power.

Hearle v. Greenbank, 306.

See also **APPOINTMENT**. **BARON** and **FEME**. **CONSTRUCTION**. **USE**. **VESTING**.

PRACTICE—36, 43, 53, 66, 69, 72, 95, 97, 188, 9, 192, 195, 205, 207, 212, 245, 6, 250, 262, 274, 326, 384, 386, 395, 406, 518, 476, 495, 542, 543.

1. Practice in six clerk's office. Entry in bill book.

Leman v. Newnham, 53.

2. Confirmation of Master's report opened, and the report allowed to be excepted to, or reviewed, under particular circumstances; although previous exceptions had been disallowed after argument.

Hawkins v. Day, 180.

3. On a bill to carry into execution a former decree, the court may reconsider the directions, and whether any mistake. *West v. Skiff*, 245.

4. Husband being abroad, a wife having appeared, and obtained an order to answer separately, whereby she freed herself from process of — tempt, will not be allowed to

PRACTICE.—continued.

her own acts set aside.

Travers v. Bulkely, 384.

5. Baron and Feme. Practice.—The whole line of process having been gone through against the plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at law, and there may be a decree for transfer of her separate property against the other defendants who did not appear.

Vanceen v. South Sea Company, 395.

6. The court will not direct any building, &c. to be pulled down by any interlocutory order; though it sometimes yet rarely does it by decree.

Ryder v. Bentham, 543.

See also ANSWER. APPEAL. CHARITIES. COSTS. DEMURRER. DENIAL. DOWER. EJECTMENT. EVIDENCE. FRAUD. HEIR. INJUNCTION. ENROLMENT. NEW TRIAL. PARTIES. PLEA. SHERIFF. WITNESS.

PRESENTATION—80, 340, 413.

1. The privilege of the elder sister to present first in turn to a living goes to her assignee.

Buller v. Bishop of Exeter, 340.

2. Presentation to a living. Twenty-five trustees were to meet, and to present and elect a clergyman—one dies; the rest are equally divided; half being in favour of *A*. the rest voting for *B*. Upon the death of the supporters of the latter, the friends of *A*. meet and sign a presentation for him. This is void at law, and cannot be supported in equity. There should have been a distinct notice for the meeting of all. A direction that the trustees should meet for such purpose "within four months," from the death of an incumbent, does not prevent their meeting after that time. Trustees cannot make proxies to vote in such a personal trust as the above; though if a choice were regularly made at a proper meeting, they might for the mere purpose of signing the presentation. Disuage, evidence of abandonment by consent, as to part of a constitution, which arose from consent.

Attorney-General v. Scott, 413.

See also CHARITIES.

PRESUMPTION—416.

A bye-law may be presumed. *Ibid.* 416.

PRIORITY—64, 215, 496.

See COPYHOLDS. DECREE and NOTICE.

PRIZE MONEY—161.

See EQUITY.

PROBATE—287, 325.

Probate obtained by fraud relieved against here, and the deed of proxy

importing a consent thereto set aside here, not in ecclesiastical court; and the defendant decreed to consent to a revocation of the probate.

Barnesly v. Powel, 287.

Vide also RECEIVER.

PROCESS—384.

See PRACTICE.

PROFERT—345, 393, 394.

1. Where *profert in cur.* is necessary, and where it may be excused.

Whitfield v. Fauvel, 393.

2. Profert not necessary in pleading a gift under the statute of uses. So where the plaintiff not entitled to the deed. *Ibid.* 394.

See also EQUITY.

PROFITS—

Devise of profits a devise of land.

Johnson v. Arnold, 171.

See also RENTS and PROFITS.

PROHIBITION—288.

Prohibition to court ecclesiastical.

Barnesly v. Powel, 288.

PROOF—274.

See EVIDENCE.

PROXY—287.

See PROBATE and EQUITY.

PURCHASE and PURCHASER—9, 75, 86, 87, 146, 173, 280, 379, 515.

1. Purchaser discovering an incumbrance may retain so much of the money, remaining in his hands as will answer it.

Troughton v. Troughton, 86, 87.

2. Purchaser or mortgagee under a decree for sale or mortgage and payment of creditors, answerable for the application of the money, if not paid into court. So also if the debts are specified in a schedule, &c. by the will.

Lloyd v. Baldwin, 173.

3. Conveyance fraudulent within the statutes of *Elizabeth*.

Underwood v. Hithcock, 280.

See also AGREEMENT (MARRIAGE.)

HEIR. IMPOSITION. TACKING.

TRUSTEE. VOLUNTARY DEED.

R.**REAL ESTATE—43, 198, 220, 402, 482.**

1. The trust of a real estate may be claimed by those who have right as real, and a conveyance demanded accordingly.

Wyth v. Blackman, 198.

2. Where land taken as money.

Ibid. 199.

3. See *Longuet v. Scawen*, 402, and REDEMPTION.

See CHARGE. CONVERSION. EQUITY.

LAND. LAPSE. PERSONAL ESTATE.

RECEIVER—324, 5.

1. The court will not appoint a receiver on bill by heir against a devisee to controvert the will, unless there are

RECEIVER—*continued*.
strong circumstances.

Knight v. Duplessis, 324.

2. This court is not to appoint a receiver on account of a dispute in court ecclesiastical concerning the probate. *Ibid.* 325.

RECITAL—313.

A recital of a debt in a deed will not constitute a specialty debt.

Lacum v. Mertins, 313.

RECOVERY—225, 430.

See COPYHOLDS.

REDEMPTION—161, 403, 405, 406.

1. Grant of annuities during life of the grantee, in satisfaction and discharge of a debt, the grantor not to be liable personally, but reserving a power to repurchase and redeem the annuities. Held part of the personal estate of the grantee, and similar to the case of *Welch* mortgages.

Longuet v. Scawen, 402.

2. The court leans against a contract for liberty to repurchase where made at the same time as the grant, and endeavours to make it a redemption. *Ibid.* 405.

3. In a *Welch* mortgage there is a perpetual power of redemption in mortgagor; and mortgagee cannot compel a redemption or foreclosure. *Ibid.* 406.

See MORTGAGE.

REFERENCE—544.

Where referred to a Master, whether two bills are for same matters; where not.

Gage v. Lord Stafford, 544.

REGISTRY ACT—64.

See NOTICE and IRELAND.

RELATIONS—84, 230, 336.

1. Where in a will a wife not included in the word *relations* according to the statute of distribution.

Davis v. Bailey, 84.

2. Bequest to such of nearest relations, as A. should think poor, and objects of charity, confined to those within the statute of distributions under A.'s advice.

Goodinge v. Goodinge, 230.

3. Devise of real and personal estate in trust for the nearest relation "of the *Pyots*." The latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the name of *Pyot*, by marriage, held not to exclude.

Pyot v. Pyot, 335.

RELEASE—264, 379, 507.

1. Owner of a charge not to be presumed to have released it by permitting it to run largely into arrear; nor without proof, to be suspected of so

doing to prejudice those in remainder. *Aston v. Aston*, 264.

2. General release restrained to what was under consideration.

Cole v. Gibson, 507.

See IMPOSITION.

REMAINDER—10, 88, 268, 9, 430.

See CONTINGENT REMAINDERS. ESTATE. LIMITATION TOO REMOTE. TRUSTEES, and WASTE.

REMOTE LIMITATION—133, 519, 521.

1. Limitation over "after legitimate heirs" too remote, unless capable of being confined to the period of the party's death.

Barret v. Beckford, 519.

2. The court leans against double portions, and presumes a like or greater legacy a satisfaction. The satisfaction should be exactly of same nature and certainty. *Ibid.* 521.

See also LIMITATION TOO REMOTE, and PERSONAL ESTATE.

RENEWAL—428.

See CONTRIBUTION.

RENT, RENT-CHARGE, & RENTS and PROFITS—41, 171, 172, 268, 387, 522.

1. A sale directed on the words *rents* and *profits* alone, though generally contrary to testator's intent; in aid of a creditor on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to legacies upon the addition of the words "as the rents and profits, &c. should advance the money." *Baines v. Dixon*, 41.

2. The king may grant a rent out of an incorporeal thing.

Duke of Leeds v. Powell, 172.

3. Devise of "rents, profits, and produce" of *West India* estates to be consigned to trustees, and applied by them in disencumbering an estate in *Scotland* of debts, and also in payment of other debts, funeral expenses and legacies. Held on rehearing that such charges could only be paid out of the annual perception of rents and profits; and that part of the former decree, which had directed the sale was reversed.

Conyngham v. Conyngham, 522.

See also EQUITY and INHERITANCE.

RENT-CHARGE—387, 390, 1, and note.

Conyngham v. Conyngham, 522.

See EQUITY.

REPORT—180.

See PRACTICE.

REPRESENTATION—201.

See VESTING.

REPRESENTATIVES—236, 237.

See EXECUTOR, &c.

REPUBLICATION—437, 440, 444, 485, 6, 492.

1. No precise words requisite.

Potter v. Potter, 442.

See WILL.

2. Lands agreed to be purchased after the will, and before the first codicil pass by such codicil, operating as a republication. Q.? Whether a codicil relating in its terms only to personal estate, and yet executed according to the statute of frauds, can operate as a republication of a will as to real estate after purchased. As to rents and profits directed, or held to be accumulated, *et c. contra*. Difference of the word "residue," with relation to real estate, or to personalty. Trust of copyhold.

Gibson v. Lord Montfort, 485, 6.

3. Where a codicil is a republication so as to pass land purchased after the will. If the codicil related only to personal estate. Q.?

Ibid. 492.

RESIDUE, and RESIDUARY DEVISE, &c.—135, 321, 2, 485.

1. Residuary bequest of personal estate includes every thing as a void legacy, or one lapsing by the dying in testator's life.

Durour v. Motteux, 321, 2.

2. Devise of real, leasehold, copyhold, and personal estate to trustees, their executors, &c. first for payment of annuities, &c. upon a deficiency of the personalty; "and as concerning 'all the rest, residue,' &c. in trust for the children of A. but if she die without issue, then to B. and C. The intermediate profits pass by this residuary devise. Not necessary the word "heirs" should have been inserted to carry the fee, for trustees have a fee when the purposes of the trust cannot be answered otherwise.

Gibson v. Lord Monfort, 485.

See also LAPSE.

RESULTING TRUST—58, 76.

1. Testator, on renewal of a lease, takes it in the names of his brother and himself, paying the fine and receiving the profits himself. Held not to be assets, but vested in the brother beneficially, upon the ground of intention, though proved but by one witness. *Maddison v. Andrew*, 58.
2. A father having provided for his eldest son, but not for the rest, takes a security for the proceeds of an estate sold in the name of himself and eldest son. Held a trust for the father's personal representatives.

Pole v. Pole, 76.

See also TRUST.

REVERSAL—133.

See CONSENT.

REVERSIONER—524.

See WASTE.

REVIEW (BILL OF)—430, 504.

Bill of Review on new matter. Question as to legal and equitable recoveries, and trustees to support contingent remainders.

E. of Portsmouth v. L. Effingham, 430.

See also DEMURRER.

REVIVOR—180.

See ABATEMENT and COSTS.

REVOCATION—32, 178, 186, 187, 189, 192, 287, 428.

1. Questions as to the revocations of a will merely on the words sent to law.

Attorney-General v. Lloyd, 32.

2. Revocation of a will.

Willet v. Sandford, 186.

3. Our laws as to wills borrowed from the civil law. *Ibid.* 187.

4. Difference between a codicil and a second will. *Ibid.*

5. Revocation by marriage, and birth of children, 189, 191.

Parsons v. Lanoe, 189.

6. Where an alteration of circumstances by having children after making a will; no strained construction should be to make the will effectual. *Ibid.* 192.

7. A difference in the statute of frauds between the penning and revocations of wills of real and personal estate.

Ibid.

8. Revocation, by a codicil directing a sale or mortgage to pay debts, merely *pro tanto*. *Verney v. Verney*, 428.

See MORTMAIN. PROBATE. REPUBLICATION.

RISK—87.

See FRAUD.

S.

SALE—41, 173, 195, 360.

As to conditional and absolute sales.

360.

See PURCHASER. RENTS and PROFITS. SHERIFF.

SATISFACTION—1, 98, 126, 226, 228, 230, 232, 238, 255, 262, 274, 5, 289, 323, 427, 501, 519.

1. Husband covenants to give his wife by deed or will 1000*l.* at his death if she survives him; but dies intestate. She is not entitled to her distributive share in addition to her claim under the covenant.

Lee v. D'Aranda, 1.

2. Legacy larger than a debt, a satisfaction for it.

Reech v. Kennegal, 126.

3. *Goodwyn v. Goodwyn*, 226.

4. Devise a satisfaction. *Ibid.* 228.

5. Legatee being a creditor under the testator, her father's marriage articles, an account directed of testator's personal estate at the making

SATISFACTION—continued.

his will, and his death, the legacy being so near in value, that it might defeat the rest.

King v. Phillips, 232.

6. See *Door v. Geary*, 235, and Title **ERRONEOUS DESCRIPTION**.

7. If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either. Contra, where he is not a general debtor for both.

Graham v. Graham, 262.

8. Covenant in marriage articles to purchase and settle lands. Lands purchased, and suffered to descend, taken in satisfaction of it.

Lewis v. Hill, 274.

9. The purchase of houses in London will not answer a covenant to purchase lands of inheritance. *Ibid.* 275.

10. Father having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it, during the daughter's life. This held a satisfaction, and the husband not entitled.

Seed v. Bradford, 501.

11. Testator being under an obligation to pay an annuity to M. P. bequeaths the residue of his estate for the benefit of his mother and M. P. for life. This is not to be considered in satisfaction of the annuity.

Barret v. Beckford, 519.

See also **CHARGE. ELECTION. FRAUD. INSURER. INTEREST. MISTAKE.**

SECURITIES—271.

See **CONSTRUCTION**.

SEPARATION—17.

1. The court never decrees an establishment of a separation between husband and wife without some agreement, and the agreement here being only for an occasional absence, and the husband offering by his answer to receive and maintain her, the arrears of the maintenance were decreed to her if she returned in a month.

Head v. Head, 17.

SEQUESTRATION—180.

See **ABATEMENT**.

SET-OFF—207, 326, 7, 373, 4.

1. No set-off allowed where the demand is in *auter droit*.

Medlicot v. Bowes, 207.

2. Relief in account, as to payments made to a bankrupt after a secret act of bankruptcy, when the assignees had recovered by action payments made by the bankrupt.

Billon v. Hyde, 326, 7.

3. Partnership set-off of mutual debts.

Ryall v. Rowles, 373, 4.

SETTLEMENT—27, 216, 376, 530.

Settlement after marriage voluntary

SETTLEMENT—continued.

and void against creditors.

Beaumont v. Thorpe, 27.

See **BARON and FEME CONSIDERATION. LACHES. VOLUNTARY DEED. SHERIFF—195.**

1. A sheriff under *fi. fa.* has a special property, and the goods bound from delivery of the writ, in the case of a common person.

Jeanes v. Wilkins, 195.

2. Debtor in custody on *ca. sa.* sheriff seizes under a *fi. fa.* and sells after the return of the writ expired, and no *venditioni exponas*; vendee assigns to the sons of debtor, who join in assignment to *Cole*. The sale by sheriff is good; but an inquiry into the fairness of the transaction. *Ibid.*

3. Purchaser under a *fi. fa.* may justify, whether the proceedings regular or not. *Ibid.*

SHIP—443, 497.

A ship pledged abroad by the master for expenses, &c. well hypothecated, and the part-owners liable.

Samsun v. Braggington, 443.

See **PARTNERSHIP**.

SIGNATURE—82.

See **AGREEMENT**.

SIX-CLERK—53.

See **PRACTICE**.

SOLICITOR—407.

See **MISREPRESENTATION**.

SON, (First, Second, &c.)—290, 294.

Where a remainder limited to first son may be taken by a second under that description.

Lomax v. Holmden, 290, 294.

See **CONSTRUCTION**.

SPECIALTY—313.

Recital of a debt in a deed under hand and seal, will not constitute a specialty debt. *Lacam v. Mertins*, 313.

SPECIFIC LEGACIES—255, 271, 420, 425.

See **ADEMPMENT. ERRONEOUS DESCRIPTION. STOCK**.

SPECIFIC PERFORMANCE—279.

See **AGREEMENT**.

SPOILIATION—235.

See **EVIDENCE**.

STOCK—255, 420, 425.

1. Legacy of. See **ERRONEOUS DESCRIPTION**.

2. Specific legacies of stock, *et c contra*. *Avelyn v. Ward*, 420.

3. Legacies of stock are specific or general legacies according to the intent of testator from the will and the circumstances, whether he meant to confine it to the stock he then had.

Avelyn v. Ward, 425.

SUIT—544, 5.

See **REFERENCE**.

SUPPLEMENTAL BILL—504.

See **DEMURRER**.

SUPPRESSIO VERI—95.

Attorney on sale of an estate not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnot v. Biscoe*, 95.

SURCHARGE—35.

See ACCOUNT.

SURETY—77, 251, 339.

1. Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. Parol evidence of an agreement between the parties deemed inadmissible.

Robinson v. Gee, 251.

2. Bill of surety in a bond to have it assigned after having paid its amount, dismissed with costs as useless. Right to principal and interest generally carries costs. Tender must be very express and formal to prevent costs.

Gammon v. Stone, 339.

See DEBTOR AND CREDITOR.

SURPLUS—57.

See CONSTRUCTION AND RESIDUE.

SURPRISE—456, 7.

See MISTAKE.

SURRENDER—63, 121, 225, 228, 271.

Defect of surrender to be supplied only for wife or child, and creditors.

Goodwyn v. Goodwyn, 228.

See COPYHOLDS.

SURVIVORSHIP—13, 70, 542.

1. See TENANT IN COMMON.

2. See LAPSE.

3. Bequest of a moiety between two; one of them dying in testator's lifetime, no survivorship, and his moiety is undisposed of.

Peat v. Chapman, 542.

T.**TACKING—86, 7, 163.**

1. Mortgagee may tack to his mortgage a bond by mortgagor against his heir at law; not against purchaser for valuable consideration.

Troughton v. Troughton, 86, 7.

2. Judgment, creditor having procured an assignment of a mortgage, allowed to take the amount and costs.

Allen v. Papworth, 163.

TENANT—462.

See WASTE.

TENANT IN COMMON—13, 70, 165, 532.

1. Devise of land to four younger children equally, share and share alike as tenants in common and not as joint-tenants, with benefit of survivorship. This referring to a former survivorship, is a tenancy in com-

mon, with a limitation to the survivors, after the death of any of them before 21, without issue.

Hawes v. Hawes, 13.

2. Devise to trustees by sale or mortgage to pay debts, the remainder to go and be equally divided among three children and the survivor of them and their heirs for ever: a tenancy in common.

Stones v. Heurtly, 165.

See also LAPSE and SURVIVORSHIP.

TENANT FOR LIFE—93, 396, 428, 477, 524, 546, 7.

See *Atton v. Atton*, 396, and Titles BARON and FEME. CONTRIBUTION. INCUMBRANCE. WASTE.

TENANT IN TAIL—217, 251, 258, 261, 459, 477, 524, 546, 7.

Tenant in tail pays off an incumbrance, but takes no assignment: the remainder over, under the circumstances, subject to pay it to his representatives. Election—Contribution.

Kirkham v. Smith, 158.

See Titles BARON and FEME. CONTRACT. INCUMBRANCE. INFANT. SURETY. WASTE.

TENDER—339.

See COSTS.

TESTAMENTARY ACT—127.

Deed and will executed on the same day; the deed held a testamentary act and as voluntary and void against creditors under the 13 Eliz.

Peacock v. Monk, 127.

TIMBER—396, 524, 546, &c.

See WASTE.

TITHES—115, 494.

By 2 E. 6. 13. land in its own nature not fit for tillage, pays no tithe for seven years after improvement: but if not fit for tillage by reason of woods, &c. pays tithe presently after improvement.

Stockwell v. Terry, 115.

See also PARTITION.

TRIAL AT LAW—32, 387, 514.

See EQUITY. REVOCATION. VOLUNTARY DEED.

TRUST—57, 76, 121, 142, 147, 152, 187, 198, 225, 468, 485.

1. Limitations apparently legal as uses executed, held to be trusts, from the purposes to be answered by a preceding devise to trustees for payment of debts, &c. Question as to whether an estate for life, or in tail.

Bagshaw v. Spencer, 142.

2. By devise to unlawful trusts the legal estate as well as the trust is void: unless part of the trust is good; for that will support the legal estate.

Willet v. Sandford, 187.

3. Collegiate body compelled to execute a trust as a private person, and though the bill not brought recently.

Green v. Rutherford, 468.

TRUST—*continued*.

See also CONSTRUCTION. COPYHOLDS.
REAL ESTATE. RESIDUARY DE-
VICE. RESULTING TRUST. TRUS-
TEE.

TRUSTEE—9, 115, 268, 9, 289, 430,
434, 453, 422, 524, 546, 7, &c. 555.

1. Trustee not to derive advantage
from a purchase of trust property.

Whelpdale v. Cookson, 8.

2. Allowance to trustees for their trou-
ble. *Ellison v. Airey*, 114, 15.

3. Trustees to support contingent re-
mainders, questions as to, 430, &c.

4. The king may be a trustee under
circumstances, see 453.

5. A trustee, with notice of his ap-
pointment as such, interfering with
the subject-matter, cannot repudiate
the trust, and say he acted merely as
factor or agent.

Conyngham v. Conyngham, 522.

See CONTINGENT—REMAINDERS.

FRAUD. WASTE.

U.

UNDERTAKING—123.

See EXECUTOR.

USAGE—413, 459.

Contracts expounded by usage of trade.

Baker v. Paine, 459.

See also CUSTOM and PRESENTATION.

USE—142, 304.

Powers over real estates introduced by
Statute of Uses, 304.

See TRUST.

USURY—164, 319.

See EQUITY and PLEA.

V.

VENDITIONI EXPONAS—195.

See WRIT.

VESTING—4, 9, 43, 59, 85, 111, 118,
197, 201, 207, 8, 9, 217, 285.

1. Devise of 1500*l.* to a grand-daughter
to be at her own disposal, if she mar-
ried with consent of her father and
mother, or trustees, and not other-
wise. She dies at thirteen intestate
and unmarried; it is not veated nor
transmissible.

Elton v. Elton, 4.

2. Legacy to J. F. the principal to be
paid as her executors should judge
necessary for him; but that he
should not give it to his wife; and if
he died without issue, that it should
revert to testatrix's family; giving
interest, however, in the "mean
time for what should continue in the
executors hands till all was paid."
A surviving executor directs pay-
ment of the legacy within two years.
The discretionary power survived,
having been given to the parties *qua*
executors, and the whole property

vested by the direction.

Flanders v. Clark, 9.

3. Legacy to be paid at a future day is
vested but not where the sum is not
certain. *Maddison v. Andrew*, 59.

4. Bequest of a contingent interest in
personalty void, where the preced-
ing gift never vested, owing to a
lapse. *Miller v. Faure*, 85.

5. Legacy of 300*l.* to Elizabeth, to be
paid at twenty-one or marriage, but
if she died before, then to the young-
er children of Francis; E. having
died unmarried under twenty-one.
Held to vest in such of the younger
children as were living at that time.

Ellison v. Airey, 111.

6. Legacy to F. when he shall attain
twenty-five, interest in mean time,
and part of the principal to place
him out; vested and transmissible
though he dies before twenty-five.

Fonnereau v. Fonnereau, 118.

7. Legacy considered vested, where
the testator has given interest on it.

Ibid. 119.

8. Furniture, &c. at H. bequeathed
for the use of those who should enjoy
the estate, to be taken care of and
delivered by executors, and to re-
main at H. as if in his own posses-
sion; vests in the first tenant for life.

Wyth v. Blackman, 197.

9. They go to the representative of the
first taker, who was tenant for life,
and were not to be sold as heir-looms
with the house, although no tenant
in tail vested. *Ibid.* 202.

10. To give right of representation no
occasion for vesting in the ancestor.

Ibid. 201.

11. Portions in a settlement by a term
after mother's death for defendants,
to grow due and payable at twenty-
one or marriage, &c., one daughter
having, after twenty-one and mar-
riage, died in life of mother, her por-
tion shall go to her representatives
and not to her sister.

Emperor v. Rolfe, 208.

12. Bequest of 3000*l.* to Jane the wife
of C., for the use of her younger
children, to be distributed as she
should appoint; in default equally.
All Jane's children by C. being born
at the time of the will and death of
testator, it was held vested as a pre-
sent legacy to them, subject to varia-
tion as between them; but not to ex-
tend to her children by a future mar-
riage. The period of vesting being
as above, one who was a younger
child at the testator's death, and be-
came an elder afterwards was held
entitled. Interest on legacies from
the end of one year from the death of

VESTING—*continued*.

testator; except as between parent and child. In the principal case, the legacies being vested, the interest allowed for maintenance, equally subject to the mother's reasonable variation. *Coleman v. Seymour*, 209.

13. Construction of will, "and" construed "or." Vested legacy. Bequest of 400*l.* to R. to be paid in a year; and of a further sum of 100*l.* at the death of his mother; the latter held also a vested legacy.

Jackson v. Jackson, 217.

14. Grant of personal estate by a deed to trustees for a niece after the death of grantor, in whose life niece dies; it goes to representative of niece, not to executor of grantor.

Peck v. Parrot, 235.

See also **LAPSE**.

VICARAGE—91.

See **AUGMENTATION**.

VISITOR—77, 78, 472, 3, 474, 5.

1. No particular form of words to make a visitor.

Attorney-General v. Talbot, 77, 78.

2. Property of donor is the origin of visitatorial power.

Green v. Rutherford, 472.

3. Visitor can judge only the statutes.

Ibid. 474.

4. It must appear that visitor can do complete justice.

Ibid. 473.

5. Visitatorial power, how far to be supported.

Ibid. 475.

See also **CHARITIES**.

VOID BEQUEST—85.

See **VESTING**.

VOLUNTARY DEED, &c.—215, 216, 379, 511, 514, 15, 535.

1. Voluntary provision in trust for natural children, good against the father's representative. The estate having been sold by him for a valuable consideration, the plaintiff's were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant. An account being directed, a deduction was made in respect of their maintenance.

Williamson v. Codrington, 511.

2. Bill lies for satisfaction out of assets of a voluntary debt by specialty; but if doubtful whether action lay thereon, or damages uncertain, it will be tried at law. Defect in voluntary deed not supplied, nor specific performance.

Ibid. 514.

3. If voluntary conveyance is defeated by sale, it is void as to purchaser; and no satisfaction, unless a covenant on which suit might be maintained.

Ibid. 515.

4. Voluntary deeds good against representatives, if they amount to a com-

plete conveyance or transfer.

Attorney-General v. Whorwood, 535.

See also **CONSIDERATION**. **CREDITORS**, and **IMPOSITION**.

W.**WARD OF COURT**—157, 159, 313.

1. Appointment of guardians resulted back to the court, after dissolution of the court of wards.

Roach v. Garvan, 159.

2. Attempt to marry a ward of court clandestinely.

Beard v. Travers, 313.

See also **GUARDIAN** and **WARD**.

WARRANTY—100, 515.

1. The word "grant" does not amount to an entire warranty in equity; nor always at law, where particular covenants are inserted. In such cases the insertion of what is express, excludes the intendment of all presumption. *Clarke v. Samson*, 100.
2. Warranty in a deed construed with regard to the subject matter.

Williamson v. Codrington, 515.

WASTE—264, 396, 462, 521, 524, 546, 7, &c.

1. The court will restrain tenants for life without impeachment of waste, to a reasonable exercise of their right. *Aston v. Aston*, 264.
1. Jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder-man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. Windfalls of timber, and other casualties, to whom the property belongs. Tenants for life. Remainder-men, &c.

Aston v. Aston, 396.

3. Copyhold tenant subject to waste, unless by act of God. And tenant for years, where burnt by fire, though no covenant to repair or rebuild.

Rook v. Worth, 462.

4. Father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. Injunction refused to restrain the father, who was without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow land, &c. To ground such an injunction, there must be waste and spoliation, and no delay in applying for it.

Petra v. Petra, 521.

5. Timber.—Tenant for life.—Tenant for years, &c. without impeachment

WASTE—continued.

of waste.—Tenant in tail and reversioner. Rights, powers, and duties of trustees to preserve contingent remainders. Tenant for ninety-nine years, if he should so long live, "without impeachment of waste, except voluntary waste," with remainder to trustees to preserve, &c. then to his first son in tail, with the reversion to *A.* in fee. The tenant for life having no son for a long while, sells timber, and divides the profits with *A.* the reversioner by agreement between themselves. The former has afterwards a son. That son as owner of the inheritance, entitled to recover what *A.* so received.

Garth v. Cotton, 524, 546, 7, &c.

WIFE.

See **BARON and FEME and RELATIONS.**
WILL—119, 284, 139, 150, 156, 177, 187, 204, 225, 229, 271, 274, 295, 306, 437, 503.

1. In a suit to establish a will in equity, all the witnesses to it should be examined, or proof given of their deaths. *Ogles v. Cook*, 177.

2. Our law as to wills borrowed from the civil law.

Willett v. Sandford, 187.

3. Difference between a codicil and a second will. *Ibid.*

4. Devise of all lands and tenements in or near *F.* by a will attested by two witnesses only, where the testator had

freehold, will not pass leasehold.—*Contra* if he had only leasehold.

Chapman v. Hart, 271.

5. Lands agreed to be purchased, pass by general words in a will, such as "or elsewhere." Republication by a codicil. *Potter v. Potter*, 437.

See also **AGREEMENT (MARRIAGE.)**
APPOINTMENT. **BARON and FEME.**
CONSTRUCTION. **COPYHOLDS.** **ELECTION.** **EVIDENCE.** **FORGERY.** **POWER.**
WITNESS.

WINDFALL—396.

See *Aston v. Aston*, 396, and **WASTE.**

WITNESS—6; 95, 97, 125, 177, 225, 426, 503.

1. See **AGREEMENT**, 1.

2. A mere witness cannot be made a defendant for discovery of what he is examinable to; unless he is interested. If the bill charges he is interested, the defendant must plead and support it by an answer denying that allegation, and cannot demur. A party cannot examine his own witness upon a *voir dire*.

Plummer v. May, 426.

3. As to a witness to a will being a creditor of testator before the act 25 Geo. II. c. 6. *Pryse v. Lloyd*, 503.

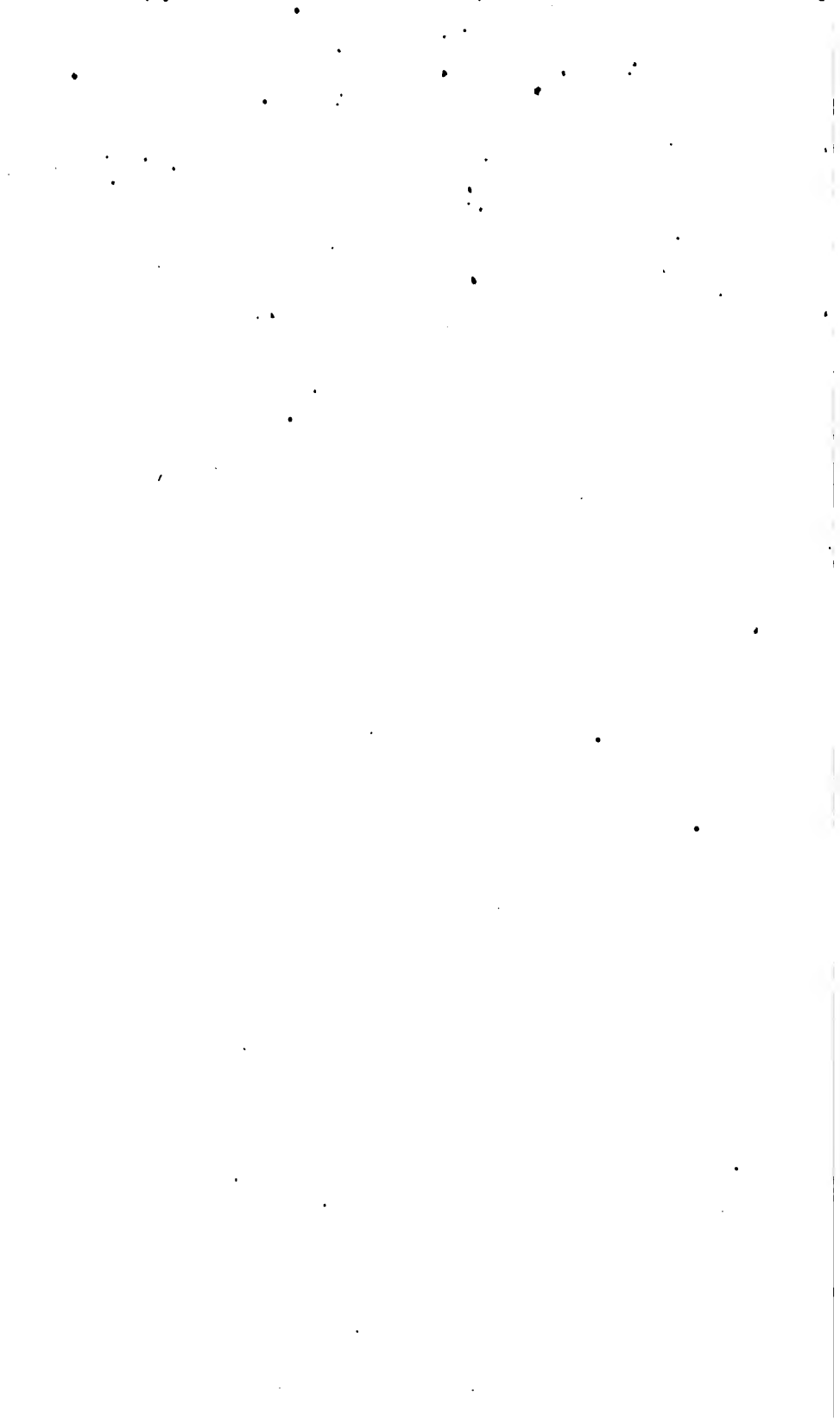
See also **AGREEMENT.** **ANSWER.** **COPYHOLDS.** **DENIAL.** **WILL.**

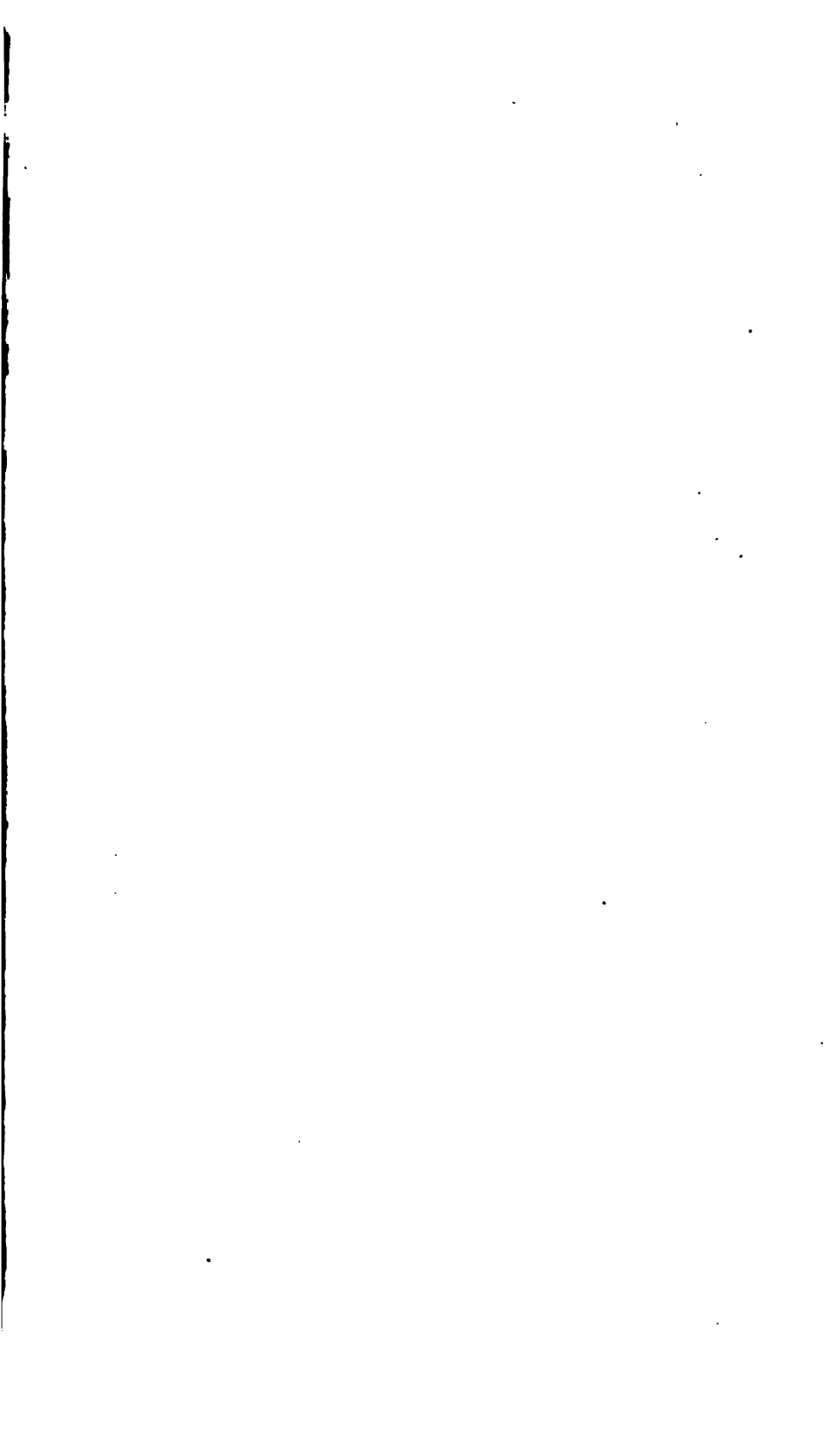
WRIT—195, 483.

Venditioni exponas a writ not of necessity. *Jeanes v. Wilkins*, 195.

See also **INQUISITION.**

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